Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

LARRY S. EAGLEYE,

Petitioner,

vs.

TRW, INC.; GENERAL ELECTRIC COMPANY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Sections 3730(b)(1) and (c)(1) (1982) of the False Claims Act (31 U.S.C. § 3730) provide that a private citizen can bring a *qui tam* action on behalf of the United States. After the Government (1) enters its appearance; (2) takes over the prosecution of the action; and (3) successfully litigates or settles the action, a Relator can receive a finder's fee up to ten percent (10%) of the recovered proceeds if the *qui tam* Plaintiff provided/disclosed evidence and information the Government did not have when the Relator filed his action. 31 U.S.C. § 3730 (c)(1) (1982).

1. Whether *qui tam* petitioner Eagleye was prejudiced and denied procedural due process afforded him under the Fifth Amendment to the United States Constitution when the district court and court of appeals considered and relied upon the sealed affidavit of Assistant United States Attorney Christian H. Stickan (which was not served upon the Petitioner nor was the Petitioner notified of its filing) in dismissing the Petitioner and finding that the Government had the requisite evidence and information of TRW's illegal conduct at the time the Relators filed their *qui tam* action.

2. Whether the *qui tam* jurisdictional bar test/definition of Section 31 U.S.C. § 3730(b)(4) (1982) is to be applied by the district court when it determines the amount of the Relator's finder's fee under Section 31 U.S.C. § 3730(c)(1) (1982).

3. Whether the 1986 amendments to the False Claims Act apply to a *qui tam* action filed after the effective date of the amendments but involves pre-1986 conduct.

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PETITION FOR A WRIT OF CERTIORARI

Qui tam Petitioner, Larry S. Eagleye, respectfully petitions for a Writ of Certiorari to review the judgment of the United States court of appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 6a) is reported at 4 F.3d 417. The opinions of the district court (App. *infra,* 32a) are unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on August 23, 1993. Petitioner's Motion for Rehearing was denied on September 21, 1993 (App. *infra*,4a). Mandate issued September 29, 1993, Petitioner's Motion for Suggestion for Rehearing *En Banc* and Motion to Recall the Court's Mandate were denied on October 14, 1993 (App. *infra*, 2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISION INVOLVED

Section 3730(c)(1) (1982), 31 U.S.C. § 3730 provides in relevant part, that a private citizen can recover a finder's fee up to ten percent (10%) of any proceeds recovered by the Government from the Defendants in a *qui tam* action for disclosing evidence or information the Government did not have when the action was brought.

STATEMENT OF THE CASE

On April 6, 1986 Petitioner Relators filed a *qui tam* action (*Eagleye I*) on behalf of the Government in a case styled *United States Government v. TRW, G.E., United Technologies and Iscar Blades Limited* pursuant to 31 U.S.C. § 3730(b)(l) (1982). When the Government entered its appearance on June 3, 1986 and took over the prosecution of the case, by General Electric, United Technologies, and Iscar Blades Limited were dropped as party defendants.

On August 12, 1987, Petitioner Eagleye filed a Second *qui tam* action (*Eagleye II*) on behalf of the Government in a case styled *Government v. TRW and G.E. Eagleye II* involved additional False Claims allegations neither plead in *Eagleye I*, nor plead in the Government's first amended complaint which the Government filed July 31, 1986, after it entered its appearance on June 3, 1986.

On November 30, 1989, the district court dismissed the Relators in *Eagleye I* under 31 U.S.C. § 3730(b)(4) (1982) and presumably, pursuant Fed Civ. R. P. 12 (b)(6). The court reasoned that at the time the *qui tam* plaintiffs filed their action the Government knew of TRW's illegal conduct and possessed sufficient information to adequately investigate the case and make a determination whether or not to take over the prosecution of the Relators' action.

The district court also dismissed *Eagleye II* on November 30, 1990, without prejudice. The court reasoned that even though *Eagleye II* was filed after the effective date of the 1986 amendments to the False Claims Act 31 U.S.C. § 3729, *et seq.*, the amendments could not apply to pre-1986 conduct, *i.e.*, the 1986 amendments could not be applied retroactively.

A. A False Claim Act/Qui Tam Provisions

This case involves (1) the construction and application of 31 U.S.C. § 3730(b)(4) and (c)(l), as amended in 1982; (2) whether or not the Petitioner was prejudiced and denied his right to Procedural Due Process offered him under the Fifth Amendment to the United States Constitution; and (3) the construction and application of 31 U.S.C. § 3730, as amended in 1986 to cases filed after the effective date of the amendment but involving pre-1986 conduct. The construction of the 1943, 1982 and 1986 amendments is aided by an understanding of the background of the False Claims Act.

In *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S. Ct. 379, 87 L. Ed. 443 (1943), the Supreme Court held that the Act as then written did not require a Relator to bring any original information to his *qui tam* suit and could rely wholly on allegations and information produced by the Government itself. In response to *Hess* and the outcry it generated, Congress passed a bill restricting *qui tam* suits. As the Senate Report for the 1986 amendments to the False Claims Act says, the Senate version of the 1943 amendments

"specifically provided that jurisdiction would be barred on *qui tam* suits based on information in the possession of the Government unless the Relator was the original source of that information." S. Rep. 345, 99th Cong., 2d Sess. (1986) at 12, *reprinted in*, 1986 U.S.C.C.A.N. 5266, 5277 ("Senate Report"). Inexplicably, says the Senate Report, the clause requiring that the Relator be the original source of the Government's information was dropped just before those amendments became law. *Id.*

Congress's effort in 1943 to narrow *Hess*' expansive reading of the *qui tam* provisions led to severely restrictive interpretations of those same provisions in later cases. Courts read the amended act as prohibiting all *qui tam* suits where the Government already possessed the information, even where the Relator had independently uncovered fraud against the Government and the Government knew of that fraud only because the Relator had been decent enough to tell the Government about it. *See, e.g., Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668 (9th Cir. 1978). In a decision that stirred controversy, the Seventh Circuit held that even though the State of Wisconsin had investigated and uncovered Medicaid fraud, it could not maintain a *qui tam* suit because the Government already had learned of the information when Wisconsin reported its discovery as required by an unrelated regulation. *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100, 1104 (7th Cir. 1984). Having told its tale of fraud to the Government, as the regulation required, the Relator was barred from suing under the Act.

This restrictive interpretation was too much for Congress. In part, the 1986 amendments to the Act were "aimed at correcting restrictive (court) interpretations of the act's. . . . *qui tam* jurisdiction" provisions. Senate Report, at 4, 1986 U.S.C.C.A.N. 5269. The 1986 amendments to *qui tam* jurisdiction were remedial, not innovative. Congress wanted in 1986 what it apparently thought it had in 1943; a law requiring that the Relator be the

original source of the Government's information. Seeking only to "correct" opinions like Dean, Congress permitted one who publicly disclosed the information to bring a *qui tam* suit. There is nothing to suggest that Congress meant to do anymore than that, and some evidence that it meant to do less. *See* § 3730(e)(2)(A) (*qui tam* suits against political officials still barred if involving information already possessed by the Government).

This interpretation of Congress' intent accords with the Act's purpose of encouraging "private individuals who are aware of fraud being perpetrated against the Government to bring such information forward", H.R. Rep. No. 660, 99th Cong., 2d Sess. 22 (1986), because the interpretation: is most likely to bring "wrongdoing to light" since, by barring those who come forward only after public disclosure of possible False Claims Act violations from acting as *qui tam* plaintiffs, it discourages persons with relevant information from remaining silent and encourages them to report such information at the earliest possible time. *Dick*, 912 F.2d at 18 (emphasis in original). *See also,* Senate Report at 2 1986 U.S.C.C.A.N. 5266 (the 1986 amendments are meant "to encourage any individual knowing of Government fraud to bring that information forward"). The paradigm *qui tam* Plaintiff is the "whistleblowing insider." *Stinson*, 944 F.2d at 1160. *Qui tam* suits are meant to encourage insiders privy to a fraud on the Government to blow the whistle on the crime.

B. Proceedings Below

1. No. 92-3066 (Eagleye I)

On April 4, 1986, Petitioner Larry S. Eagleye, Alan J. Russ and Charles Broome (the "Relators") filed a complaint under the then-existing *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b) (1982), against TRW, Inc. ("TRW"), General Electric Company, United Technologies Corporations and Iscar Blades, Ltd., alleging that the Defendants had engaged in several different

conspiracies that resulted in the presentation of false claims for payment to the United States. *United States of America ex rel. Eagleye, et al. v. TRW Inc., et al.*, Civil Action No. 86-1292 (N.D. Ohio) (*"Eagleye I"*). (R. 1: Complaint). Pursuant to the provisions of 31 U.S.C. § 3730(b)(2) (1982), on June 3, 1986, the Government entered its appearance and assumed control of the litigation. (R . 11: Notice of Appearance).

Subsequently, the Government filed first, second and third amended complaints.

On November 30, 1990, the district court granted the Government's motion to dismiss the Relators on the grounds that the *qui tam* provisions in effect when the original complaint was filed in April, 1986, 31 U.S.C. § 3730(b)(4) & (c)(1) (1982), barred a Relator from sharing in any monetary recovery that might be obtained if the action was based on information already in the Government's possession at the time the complaint was filed, as was the case with the allegations adopted and incorporated by the Government in its first and second amended complaints. (R. 262: Memorandum of Opinion and Order; R. 263: Order of Dismissal).

On July 31, 1991, the district court denied the Relators' motions for reconsideration and to alter or amend the order dismissing them from the action. (R. 288: Marginal Entry Orders dated 7/31/91). On December 10, 1991, the district court, pursuant to the provisions of Fed. R. Civ. P. 54(b) directed entry of final judgment against the Relators. (R. 305: Order). Relators filed a Notice of Appeal on January 8, 1992. (R. 309: Notice of Appeal). The court of appeals affirmed the district court's judgment, but upon a different legal principle.

2. No. 91-3784 (Eagleye II)

On August 12, 1987, Relator Eagleye filed a complaint against

TRW and General Electric Company under the 1986 amendments to the *qui tam* provisions of the False Claims Act. *United States of America ex rel. Eagleye v. TRW, Inc. and General Electric Company,* Civil Action No. 87-2088 (N.D. Ohio) (*"Eagleye II"*). (R. 1: Complaint).[1] In that complaint and the second and third amended complaints, Relator Eagleye alleged claims against TRW and GE during interviews with the Government after *Eagleye I* was filed.

The Government entered its appearance in *Eagleye II* on January 11, 1988. (R. 11: Notice of Appearance). Upon appearing, the Government moved pursuant to 31 U.S.C. § 3730(e)(3) (Supp. IV 1986) to dismiss Relator Eagleye from the action because the suit was based upon allegations or transactions that were already the subject of a civil suit in which the United States was a party, namely, *Eagleye I*. At the same time, the Government filed a notice of dismissal pursuant to the provisions of Fed. R. Civ. P. 41(a)(1).

On November 30, 1990, the district court granted the Government's motion to dismiss. (R. 263: Order of Dismissal). In its opinion and order, the court held that the 1986 amendments to the False Claims Act court not be applied in an action involving conduct that occurred prior to the enactment of the amendments and, accordingly, considered the Government's motion under the provisions of 31 U.S.C. § 3730(b)(1) (1982). Under those provisions, the court found that dismissal was proper if consented to in writing by the Government and the court. (R. 263: Memorandum of Opinion and Order at 3-5).

On July 30, 1991, the court denied Relator Eagleye's motion to amend the order of dismissal. (R. 117: Order Overruling Relator's Motion to Amend). Relator Eagleye filed a Notice of

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1. The district court's docket sheet for *Eagleye II* does not contain record entry numbers.

Appeal on August 23, 1991. The court of appeals affirmed the judgment of the district court that the 1986 amendments to the False Claims Act-*qui tam* provisions do not apply to pre-1986 conduct.

REASONS FOR GRANTING THE WRIT

As this Court held in *Carter vs. Kubler*, 320 U.S. 243, 247 the basic elements for a full and fair hearing "include the right of each party to be apprised of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence." The Fifth Amendment to the United States Constitution protects this right. The judgment of the district court and the Sixth Circuit court of appeals is based upon evidence and factual allegations and information that the Relators were never advised of nor had a chance to refute; in clear violation of the Relators' procedural due process rights.

If the court of appeals' ruling is not reversed and the case remanded to the district court, it will send a chilling message to those prospective Relators who act in good faith, and assist the Federal Government in recouping monies it paid as result of false claims being presented to it for payment.

In this case, the Petitioner and the other Relators were actually precluded by the district court, and the Sixth Circuit court of appeals from presenting evidence to refute the Government's contention that it possessed sufficient information of TRW's illegal conduct at the time of the filing of the *qui tam* action, to make a decision whether or not to enter its appearance and take over the prosecution of the action.

I.

THE PETITIONER/RELATORS WERE PREJUDICED AND DENIED PROCEDURAL DUE PROCESS AFFORDED THEM UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Our advisorial legal system generally does not tolerate *ex parte* determinations on the merits of a civil case. *Kinoy v. Mitchell*, 67 F. R.D.1, 15 (S.D.N.Y. 1975). An exception in which this principle is made, is whether there is a countervailing Government interest that the information sought to be discovered should remain secret. This is to say, that privileged questions are determined on the basis of *in camera, ex parte* examination of the evidence by the *trial* court. *Kerr v. United States District Court*, 426 U.S. 394, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976).

It should be pointed out to the Court that on April 19, 1988, Petitioner Eagleye plead guilty to a one-count 18 U.S.C. § 371 conspiracy information. (R. 111: Exhibit in Support of the Government's Motion to Dismiss Relators Ex B: Judgment.) The Petitioner was fined $2,500 and given one year of probation; no imprisonment was neither imposed nor suspended.

As the Court will see from page 4 of the Petitioner's criminal information that Petitioner Eagleye plead to, the 820(A) tooling account was established by other financial managers; further, the Court will further note from page 6 of the Petitioner's criminal information that the Petitioner was (instructed) to use the 820(A) tooling account. (R. 111: Exhibit in Support of the Government's Motion to Dismiss the Relators Ex B: Judgment).

On August 25, 1988, Appellee TRW plead guilty to each of three counts of a criminal information charging it with conspiracy to defraud the United States in violation of 18 U.S.C. § 371. (App.

R. 117: Brief of United States Government to Dismiss Relators Ex 1: Judgment). It should be mentioned that the Petitioners' immediate supervisor and corporate officer also plead guilty to criminal information.

The district court and the Sixth Circuit Court of Appeals, in its appeal *de novo* based their respective decisions upon an affidavit of Assistant United States Attorney Christian H. Stickan which was filed with the district court *in camera* and under seal, on October 3, 1989. (R. 203: Memorandum of the United States in Opposition to Defendants' Motion to Strike Ex A: Stickan Affidavit). The Stickan Affidavit allegedly contained information concerning the grand jury investigation of TRW.

The Government also filed *in camera* and under seal, two TRW internal reports of its investigation into the alleged fraudulent activities at Compressor Components Division (CCD) (*i.e.*, November 28, 1985 and February 28, 1985). (R. 245: Sealed Envelope).

To refute the Government's contention that it possessed the requisite information of TRW's illegal conduct, Petitioner Eagleye filed on September 15, 1989 a Motion to Unseal, Disclose, and Review TRW's Grand Jury documents and transcript, R.195. (App., *infra*, 53a). Petitioner Eagleye also caused to be issued notices and subpoenas *duces tecum* for the depositions of Assistant United States Attorney, Christian H. Stickan, Jim Thomas of the Defense Criminal Investigative Services, Joe Greenberg of the Defense Logistic Agency-Defense Contract Administrators and Joyce R. Branda of the Department of Justice. (R. 194)

The Department of Justice and the Department of Defense filed a Motion to Quash Petitioner Eagleye's subpoena *duces tecum* and for a Protective Order and further, filed a Brief In Opposition to Petitioner Eagleye's Motion to Unseal, Disclose,

and Review Grand Jury Documents and Transcripts. The district court granted the Government and the Department of Defense's Motions for a Protective Order and Overruled Petitioner Eagleye's Motion to Unseal, Disclose, Review Grand Jury Documents and Transcripts.

Petitioner Eagleye also requested the Sixth Circuit court of appeals to unseal and allow Petitioner's attorney to review the affidavit of Assistant United States Attorney Christian H. Stickan's (App., *infra*, 31a).

In *Douglas Oil v. Petro Stocks Northwest*, 441 U.S. 211, 99 S. Ct. 1667, 60 L. Ed. 2d 156 (1979), this Court held that the secrecy of Grand Jury records may be breached when (1) the records are needed to avoid a possible injustice in another judicial proceeding; (2) the need for disclosure is greater than the necessity for continued secrecy; and (3) the request is so structured as to cover only needed materials.

As the Court will note (App., *infra*, 70a-73a), Petitioner Eagleye was specific as to the information he was looking for as well as the time period.

In closing, what is interesting to note is that the Criminal Division of the Justice Department started an investigation on December 4, 1984. However, it wasn't until January of 1987, (eight months after the Relators filed their *qui tam* action and after Petitioner Eagleye gave 1,125 pages of sworn testimony to the Justice Department), until the DCA issued its 97 page audit report of the fraud. Petitioner Eagleye gave his sworn testimony to the Department of Justice and DCA Auditors beginning on April 6, 1986 through June 7, 1987.

II.

THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS.

The court of appeals held that the Petitioner Relators were barred, *as a matter of law,* from receiving an informer's fee because the Government was aware of TRW's illegal actions and conduct prior to the filing of the *qui tam* action on April 4, 1986 by the 31 U.S.C. § 3730(c)(1) (1986) and Fed. R. Civ. P. 56.

The court of appeals reasoned and cited *United States ex. rel. State of Wisconsin v. Dean,* 729 F.2d 1100, 1103 (7th Cir. 1984) that the Government had the requisite evidence and information of TRW's illegal conduct prior to the filing of the *qui tam* action on April 6, 1984.

The circuit court went on to hold that in determining whether the Government had such prior knowledge, the Government's knowledge need not be the "mirror image" of that in the hands of the informer; rather, the information need only be sufficient to enable the Government to adequately investigate the case and decide whether or not to enter its appearance and take over the prosecution of the case.

The error of statutory construction and application the court of appeals makes in its opinion, is in the applying of the "mirror image" and "sufficient evidence to investigate" *jurisdictional bar test* of 31 U.S.C. § 3730(b)(4) (1982), to 31 U.S.C. § 3730(c)(1) (1982) when the district court determines the amount of a Relators finder's fee.

31 U.S.C. § 3730(b)(4) is the provision of the False Claims Act that provides the district court with *subject matter jurisdiction* over a Relators *qui tam* action where the Government declines to

enter its appearance and take over the prosecution of the *qui tam* action.

The only time a district court will be confronted with the issue that it *lacks subject matter jurisdiction* over a *qui tam* action is when the Defendant or the Government, after making a special appearance, (*United States ex. rel. Thompson v. Hayes*, 432 F. Supp. 253 (1976)) files a motion to dismiss the *qui tam* complaint, pursuant to 31 U.S.C. § 3730(b)(4) (1982), because the evidence or information which is the basis of the Relator's action was known by the Government when the action was filed.

However, if the Government declines to enter a special appearance and file a motion to dismiss, (pursuant to 31 U.S.C. § 3730(b)(4) (1982)), but instead enters its appearance and takes over the prosecution of the action, the district court then has subject matter jurisdiction of the action, pursuant to 31 U.S.C. § 3729 (1982) and 31 U.S.C. § 3730(g)(3) (1982).

Once the Government has entered its appearance and taken over the prosecution of the action, the issue of the Court having or not having subject matter jurisdiction becomes moot; and further, the application 31 U.S.C. § 3730(b)(4) (1982) ends further action.

31 U.S.C. § 3730(c)(1) (1982) neither speaks to, nor addresses whether or not a district court has subject matter jurisdiction over a *qui tam* action. This provision only addresses when and under what circumstances a *qui tam* Plaintiff can receive an informer's fee and how much that informer's fee will be.

Nowhere in 31 U.S.C. § 3730(c)(1) (1982) does it provide that the person bringing the action may receive an amount the Court decides is reasonable for disclosing evidence or information which is the basis of the *qui tam* action the Government did not have when the action was brought.

31 U.S.C. § 3730(c)(1) (1982) only requires that a Relator provide the Government with evidence or information which the Government did not have when the *qui tam* action was brought. Therefore, 31 U.S.C. § 3730(c)(1) (1982) cannot require that the evidence or information that the Government did not possess was the same evidence or information which was the basis of the Relator's *qui tam* action. *United States v. Pittman,* 151 F. 2d 851.

31 U.S.C. § 3730(c)(1) (1982) does not speak to when the evidence or information is to be given to the Government. This provision only requires that the evidence or information that is given to the Government not be known by the Government, at the time the *qui tam* action was brought.

On the other hand, 31 U.S.C. § 3730(b)(4) (1982) requires that the evidence or information that is to be given to the Government, be given at the time of the filing of the *qui tam* action. This is because 31 U.S.C. § 3730(b)(4) (1982) speaks to and only addresses itself to that "evidence or information" which is the basis of the Relator's *qui tam* action.

Therefore, 31 U.S.C. § 3730(b)(4) (1982) can only be interpreted to mean that the evidence or information, which is the basis of the *qui tam* action, has to be given to the Government at the time that the *qui tam* action is filed. Conversely, because 31 U.S.C. § 3730(c)(1) (1982) does not refer to the evidence or information which is the basis of the *qui tam* Plaintiff's action, this section of the False Claims Act can only be interpreted to mean that a Relator shall receive an informer's fee for providing the Government with new evidence and information that it did not have when the *qui tam* action was brought by the Relators.

If the Government enters an appearance and takes over the prosecution of the action to a successful conclusion then the district court must then apply 31 U.S.C. § 3730(c)(1) (1982) and

determine (1) whether the *qui tam* Plaintiff did provide the Government with new and material evidence or information the Government did not have when the *qui tam* action was filed and, if so; (2) how significant to the Government was such evidence or information in bringing the False Claims action to a successful conclusion. *United States ex rel. LaValley v. The First National Bank of Boston,* 707 F. Supp. 1351, 1354, 1355 (1988). *See also, United States ex rel. Bayarsky,* 210 F.2d 257, 258, 259 (1954).

The record will clearly demonstrate that Petitioner Eagleye gave the Government new detailed information and evidence concerning (1) the specific manner, method and means of all of TRW's fraudulent overcharging, whether reported or unreported; (2) on how TRW's fraudulent overcharging had been and was hidden from Government auditors and investigators; (3) where to look for all of TRW's fraudulent overcharging; and (4) how to calculate the monetary amount of TRW's fraudulent overcharging. (R.195-1125 pages of sworn testimony of Petitioner Eagleye given to the Department of Justice). This Court only has to read the letter of former Assistant to the United States Attorney, Chief Civil Division, for the Northern District of Ohio, Allen J. Roth, Esq.'s letter of June 24, 1988 (R.196) wherein he states the following: "Mr. Eagleye was of enormous benefit to the Government in its investigation. Indeed, it is not overstating the point to conclude that without Mr. Eagleye's cooperation, the Government's efforts in this civil false claims case would have been severely hindered."

III.

THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS.

The court of appeals held that the 1982 provisions of the False Claims Act apply because *Eagleye II*, although filed in 1987, was based on TRW's conduct, which occurred prior to the enactment of the 1986 Amendments.

The court relied on *United States v. Murphy*, 937 F.2d 1032, 1037 (6th Cir.1991) for the principle that there is no clear language in the amendments to the False Claims Act indicating whether courts should apply the amendments retroactively.

The court further relied on *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988) that "retroactively is not favored in the law" and "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."

The Petitioners continued to rely on *Bradley v. Richmond School Board*, 416 U.S. 696 (1974) which states the principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."

In this case, there is no manifest injustice and, therefore, the amendments to the False Claims Act should be applied retroactively.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE SUPREME COURT OF THE UNITED STATES DATED DECEMBER 10, 1993

SUPREME COURT OF THE UNITED STATES

No. A-476

Larry S. Eagleye,

Petitioner

v.

TRW, Inc.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including January 19, 1994.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 10th
day of December, 1993.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED OCTOBER 14, 1993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 91-3784/92-3066

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

ex. rel. LARRY S. EAGLEYE, ET AL.,

Plaintiffs-Appellants,

v.

TRW, INC.; GENERAL ELECTRIC COMPANY,

Defendants-Appellees

ORDER

BEFORE: RYAN and SUHRHEINRICH, Circuit Judges; and PECK,* Senior Circuit Judge.

Upon consideration of appellant Eagleye's motions to file petition for rehearing en banc out of time and to exceed the page limit; motion to recall the mandate, and; motion to vacate this court's order of September 21, 1993,

And upon further consideration of the appellee USA's response in opposition to the motions to vacate and recall the mandate,

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* Hon. John W. Peck did not participate in this decision due to his untimely death on September 7, 1993

Appendix B

It is ORDERED that the motions be and hereby are denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green, Jr.
Leonard Green, Clerk

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED SEPTEMBER 21, 1993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No: 92-3066: 91-3784

UNITED STATES OF AMERICA;

Plaintiff-Appellee

LARRY S. EAGLEYE; ALAN RUSS; CHARLES BROOME

Plaintiffs-Appellants

v.

TRW, INC.

Defendant-Appellee

ORDER

BEFORE: RYAN and SUHRHENRICH, Circuit Judges; and PECK, Senior Circuit Judge.*

Upon consideration of appellant's motion to file petition for rehearing over the page limit,

It is ORDERED that the motion be and it hereby is GRANTED.

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* The Honorable John W. Peck did not participate in this decision due to his untimely death on September 7, 1993.

Appendix C

Upon further consideration of the petition for rehearing filed by the appellant,

It is further ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green, Jr.
Leonard Green, Clerk

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AUGUST 23, 1993

UNITED STATES of America,

Plaintiffs-Appellants,

v.

TRW, INC. (91-3784/92-3066); General Electric Company (91-3784),

Defendants-Appellees.

Nos. 91-3784, 92-3066.

United States Court of Appeals, Sixth Circuit.

Argued March 22, 1993.

Decided Aug. 23, 1993.

Rehearing Denied Sept. 21, 1993*

Order Denying Motions
Oct. 14, 1993*

Marcia W. Johnson, Asst. U.S. Atty., Office of the U.S. Atty., Cleveland, OH; Michael F. Hertz, Jr., David W. Long (argued and briefed), Joyce R. Branda, U.S. Dept. of Justice, Civ. Div., Washington, DC; John S. Rea, Meyers, Hentemann & Schneider, Reginald P. Trubey, Jr. (argued and briefed), Bernardic &

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* The Honorable John W. Peck did not participate in this decision due to his untimely death on Sept. 7, 1993.

Trumbey, Cleveland, OH, Leonard F. Carr, Carr, Feneli & Carbone, Mayfield Heights, OH; and Judith A. Lehnowsky, Rocky River, OH, for plaintiffs.

Gerald W. Palmer (argued), Dale H. Oliver, Jones, Day, Reavis & Pogue, Los Angeles, CA; Patrick F. McCartan (briefed) Jones, Day, Reavis & Pogue, Cleveland, OH, Susan Z. Haller, Jones, Day, Reavis & Pogue, Washington, DC; and Robert D. Labes (briefed) and Thomas S. Kilbane, Squire Sanders & Dempsey, Cleveland, OH, for defendants.

Before: RYAN and SUHRHEINRICH, Circuit Judges; and PECK, Senior Circuit Judge.

RYAN, Circuit Judge.

This appeal involves two consolidated cases filed under the *qui tam*[1] provisions of the Federal False Claims Act (the Act), 31 U.S.C. §§ 3729 *et seq.* In Case No. 92-3066 (*Eagleye I*), the plaintiffs, Larry Eagleye, Alan Russ, and Charles Broome, appeal the district court's order dismissing them from the action. The issues in this appeal are:

> Whether the district court correctly ruled that the 1986 and 1988 amendments do not apply retroactively to the plaintiffs' *qui tam* action; and

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1. A *qui tam* action is "an action brought by an informer, under a statute which establishes a penalty for the commission . . . of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution." Black's Law Dictionary 1251 (6th ed. 1990).

Appendix D

whether the district court correctly determined that the plaintiffs are not entitled to recover under the 1982 provisions of the Act.

Case N. 91-3784, 947 F.2d 947, (*Eagley)* the plaintiff. Eagleye appeals the district court's order dismissing the entire action, and the issue raised on appeal is:

Whether the district court properly dismissed Eagleye's second *qui tam* action. Because we find that the district court committed no error, we shall affirm.

I.

A. Background

In November 1984, counsel for defendant TRW met with representatives of the federal government to inform them of an internal investigation into the accounting practices of TRW's Aircraft Components Group. On November 28, 1984, TRW provided the Department of Justice and the Department of Defense with a report that detailed the results of TRW's internal investigation. According to the report, TRW uncovered government subcontract pricing irregularities, which occurred between 1978 and 1984, by a division of its Aircraft Components Group. Under these noncompetitive subcontracts, the Components division had manufactured parts for military jet engines for several government prime contractors. On February 28, 1985, TRW provided the government with a supplemental report disclosing the results of an audit of the materials purchased by the Components division for its government contracts. The November and February reports revealed irregularities in the Components division's standard cost accounting system that resulted in overcharges to the government for labor and parts.

Appendix D

As a result of TRW's voluntary disclosure, the government opened a criminal investigation in December 1984. The criminal investigation was concluded in August 1988 when TRW and five former division employees, including two of the *qui tam* plaintiffs in the case, pled guilty to various criminal charges. On April 19, 1988, plaintiff Eagleye pled guilty to one count of conspiring to defraud the government, in violation of 18 U.S.C. § 371; on August 25, 1988, TRW pled guilty to three counts of conspiring to defraud the government; and on August 31, 1988, plaintiff Broome pled guilty to one count of mail fraud, in violation of 18 U.S.C. § 1341.

B. The False Claims Act

Under the False Claims Act, a person who "knowingly presents . . . a false or fraudulent claim for payment" to the government can be liable to the government for: 1) a penalty, between $5,000 and $10,000 under the present provisions, and $2,000 under the 1982 provisions; 2) three times the amount of damages sustained by the government, two times the amount under the 1982 version; and 3) costs of the civil action brought to recover the penalty or damages. 31 U.S.C. § 3729(a). The Act contains *qui tam* provisions under which an individual may bring a civil action on his own behalf and on behalf of the government against anyone who violates the Act. 31 U.S.C. § 3730(b)(1). Under the Act, if an individual files such a civil suit, the government may take over the action by entering an appearance within 60 days after being notified of the pendency of the lawsuit. 31 U.S.C. § 3730(b)(2). Under the 1982 version of the Act, "[i]f the Government proceeds with the action, the action is conducted only by the Government," and "[t]he Government is not bound by an act of the person bringing the action." 31 U.S.C. § 3730(b)(3). An individual who brings a *qui tam* action may receive a reasonable portion of the amount recovered even if the government takes over the action. 31

U.S.C. §§ 3730(b)(1) and (c) (1982). The 1982 Act also includes a provision that prohibits the district court from exercising jurisdiction over suits brought under the Act in cases where the government decides not to participate in the action and the *qui tam* plaintiff's claims are based on information already in the possession of the government. 31 U.S.C. § 3730(c))1) (1982).

On October 27, 1986, Congress amended the Act. False Claims Amendment Act of 1986, Pub. L. 99-562, 100 Stat. 3153 (Oct. 27, 1986), now codified at 31 U.S.C. §§ 3729-3733 (1988). The amendments expand the circumstances under which citizens may bring suit on behalf of the government, participate in the litigation, and recover a share of a judgment. The amendments change the Act's jurisdictional bar to provide that *qui tam* actions based on information that was publicly disclosed prior to initiation of the action will be barred unless the plaintiff who brings the action is an "original source" of the informtion underlying the complaint. 31 U.S.C. § 3730(e)(4)(A). Congress further amended the Act in 1988 to provide for the dismissal of plaintiffs who are "convicted of criminal conduct arising from [their] role in the violation of [the Act]." Major Fraud Act of 1988, § 9, Public L. 100-700, 102 Stat. 4638 (Nov. 19, 1988), now codified at 31 U.S.C. § 3730(d))3) (1988).

II. *Eagley I*

A.

On April 4, 1986, before the 1986 amendments became effective, Eagleye, Russ, and Broome filed a *qui tam* action under the Act, 31 U.S.C. §§ 3729 *et seq.*, against defendants TRW, General Electric Company, United Technologies, and Iscar Blade Ltd., an Israeli defense contractor (*Eagleye I*). The plaintiffs'

complaint alleged that GE, as contractor, and TRW, as subcontractor, engaged in several conspiracies that resulted in the presentation of false claims for payment to the United States on military jet engine contracts from 1979 through 1984. Several of the allegations in the complaint were directed solely at TRW for that company's role as a military subcontractor for jet engine parts. The complaint also alleged that TRW, United Technologies, and Iscar Blades improperly shared price information and conspired to defraud the government on military contracts between 1979 and 1984.

After an investigation into the allegations, on June 3, 1986, the government entered its appearance and assumed control over the prosecution of the case, pursuant to 31 U.S.C. § 3730(b)(2) (1982). On July 31, 1986, the government filed an amended complaint. The amended complaint contained only one claim against one defendant—TRW. The Department of Justice referred the other allegations against the other defendants, including those against GE and other allegations against TRW, to the Defense Department's Office of Inspector General for further investigation. On July 31, 1986, the district court entered a stipulation and order that provided, in part:

> The original complaint shall not be the basis for any further proceedings by the [*qui tam* plaintiffs] in this action or for any separate action brought or pursued by the [*qui tam* plaintiffs].

On August 4, 1986, the district court issued an order regarding the status of the defendants named in the original complaint who were not named in the amended complaint. The order dismissed GE, United Technologies, and Iscar Blades without prejudice because

of the United States' decision not to include them as named defendants in the amended complaint.

Congress amended the Act, as we have said, in October 1986. On March 23, 1987, the *qui tam* plaintiffs filed a motion to "Have Standing under the 1986 False Claims Act." In their motion, plaintiffs argued that the 1986 amendments should apply retroactively to the pending litigation. In 1988, Congress again amended the Act. On March 13, 1989, the government filed a motion to dismiss the plaintiffs from the case. In its motion to dismiss, the government argued that the jurisdictional bar of the 1982 Act, 31 U.S.C. § 3730(b)(4) (1982), and the provisions limiting the plaintiffs' recovery to what is reasonable 31 U.S.C. § 3730(c)(1) (1982), required dismissal of the plaintiffs because the information contained in the plaintiffs' initial complaint was based on informtion and evidence already in the possession of the government at the time the lawsuit was filed. In the alternative, the government argued that if the court finds that the 1986 amendments apply retroactively to this *qui tam* action, then 31 U.S.C. § 3730(e)(4)(A) (1986) requires the dismissal of the plaintiffs because their action is based upon the public disclosure of allegations from the news media. Finally, the government argued that two of the three plaintiffs, Eagleye and Broome should be dismissed under 31 U.S.C. § 3730(d)(3) (1988) because the 1988 amendment requires dismissal of persons who were convicted of crimes in connection with the fraud alleged in a *qui tam* action.

On June 28, 1989, the district court rejected plaintiffs' argument that "standing" in the case should be determined under the 1986 amendments to the Act and ruled tht the Act's 1982 provisions apply to this action. On November 30, 1990, the district court ruled on the government's motion to dismiss. The court

concluded that the plaintiffs' claims were based on information that was in the government's possession when the plaintiffs filed their action. Applying the 1982 provisions, the district court ruled that, under 31 U.S.C. §§ 3730(b)(4) and (c)(1), plaintiffs were not eligible for an informer's fee and, accordingly, granted the government's motion to dismiss.

On July 31, 1991, the district court denied the plaintiffs' motion for reconsideration or to alter and amend the judgment that had been entered. At the plaintiffs' request, the district court certfied its judgment order to be a final judgment, pursuant to Fed. R. Civ. P. 54(b). Plaintiffs filed a timely notice of appeal.

B.

1. Retroactivity

The *qui tam* plaintiffs argue that the district court erred in ruling that the 1986 amendments were not retroactive. According to plaintiffs, because the 1986 amendments apply to this lawsuit, they should have been allowed to participate in the litigation and should not have been dismissed. Plaintiffs rely on *Bradley v. Richmond School Board*, 416 U.S. 696, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974), to support the argument that the law in effect at the time of the district court's decision governs unless there is some legislative history to the contrary. The government and TRW agree, although for different reasons, that the district court correctly determined tht the 1982 *qui tam* provisions of the Act are controlling and that the 1986 amendments do not apply retroactively. They also agree that the district court properly dismissed the plaintiffs under the Act's 1982 *qui tam* provisions because the action was based on information already possessed by the government. We agree with the government and TRW that the Act's amendments do not apply retroactively.

Appendix D

Because the issue before us involves questions of statutory interpretation, our review is *de novo*. *See United States v. Clay*, 982 F.2d 959, 961 (6th Cir. 1993).

The Supreme Court has held that, where congressional intent is clear as to the statute's retroactive or prospective application, that intent governs. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837, 110 S. Ct. 1570, 1576, 108 L. Ed. 2d 842 (1990). In this instance, however, there is no clear language in the amendments to the False Claims Act indicating whether courts should apply the amendments retroactively. *See United States v. Murphy*, 937 F.2d 1032, 1037 (6th Cir. 1991). Plaintiffs rely on *Bradley*, 416 U.S. at 715-17, 94 S. Ct. at 2018-19, for the principle that the court is to apply the law in effect at the time it renders its decision, unless doing so would result in a manifest injustice or there is statutory direction or legislative history to the contrary. *Bradley*, however, conflicts with the Supreme Court's more recent statements in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208, 109 S. Ct. 468, 471, 102 L. Ed. 2d 493 (1988), that "[r]etroactivity is not favored in the law" and "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."

In *Kaiser Aluminum*, the Supreme Court chose not to resolve the conflict between *Bradley* and *Bowen*, and instead found that the particular statute at issue[2] clearly set forth Congress's intent that the statute is to be applied prospectively. *Kaiser Aluminum*, 494 U.S. at 837, 110 S. Ct. at 1576. Justice Scalia concurred in the result but wrote separately because he believed that the retroactivity rule of *Bradley* is a misstatement of clearly established law. *Id.* at 840-41, 110 S. Ct. at 1578-79 (Scalia, J.,

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2. The federal postjudgment interest statute, 28 U.S.C. § 1961.

concurring). Thus, in *Kaiser Aluminum*, Justice Scalia would have taken the opportunity:

> to admit that the rule [the Court] expressed in . . . *Bradley* was wrong, and to reaffirm the clear rule of construction that has been applied, except for these last two decades of confusion, since the beginning of the Republic and indeed since the early days of the common law: absent specific indication to the contrary, the operation of nonpenal legislation is prospective only.

Id. at 841, 110 S. Ct. at 1579 (Scalia, J., concurring.[3]

In an attempt to resolve the tension between *Bradley* and *Bowen*, this court, in *Boddie v. American Broadcasting Cos.*, 881 F.2d 267 (6th Cir. 1989), *cert. denied*, 493 U.S. 1028 110 S. Ct. 737, 107 L. Ed. 2d 755 (1990), ruled that "*Bradley* represents a relatively narrow exception to the general principle that statutes operate only prospectively,' a notion 'familiar to every law student.' " *Id.* at 269-70 (citation omitted). Accordingly to *Boddie*, where the statute does not clearly indicate that its provisions are retroactive, "post-*Bradley* cases have reaffirmed the 'venerable rule . . . that statutes affecting substantive rights and liabilities are presumed to have only prospective effect.' " *Id.* at 270 (citations omitted).

In *United States v. Murphy*, 937 F.2d at 1037, this court ruled

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3. Justice Scalia "limit[ed] the expression of the rule to nonpenal legislation because a contrary presumption (i.e., a presumption of retroactivity) is applied to the repeal of punishments." *Kaiser Aluminum*, 494 U.S. at 841 n. 1, 110 S. Ct. at 1579 n. 1 (Scalia, J., concurring).

that while *Boddie* and recent Supreme Court cases require a narrow reading of *Bradley*, the phrase "substantive rights and liabilities" in *Boddie* should be construed broadly in the context of determining whether a statute is retroactive. *Id.* at 1038. In *Murphy*, this court examined the 1986 amendment to 31 U.S.C. § 3729(a) and determined that the provision was not retroactive because it involved "substantive rights." Under section 3729(a):

> Any person who . . . knowingly presents . . . to an officer or employee of the United States government . . . a false . . . claim for payment . . . is liable to the United States Government. . . ."

31 U.S.C. § 3729(a) (1986). Prior to 1986, section 3729(a) subjected culpable defendants to double damages and a civil forfeiture of $2,000. The 1986 amendment allowed treble damages and an increased forfeiture. The 1986 amendment also defined "knowingly" for purposes of the statute to include "deliberate ignorance of the truth," 31 U.S.C. § 3729(b)(2) (1986), while, prior to 1986, this circuit required plaintiffs to show, by clear, unequivocal evidence, that defendant actually knew of the claim's falsity. *Murphy*, 937 F.2d at 1038 (citing *United States v. Ekelman & Assoc., Inc.*, 532 F.2d 545, 548 (6th Cir. 1976). In *Murphy*, the government contended that the 1986 amendments should apply retroactively because they are merely remedial and do not affect substantive rights and liabilities.[4] This court, however, determined that 31 U.S.C. § 3729(a) involves substantive rights because, prior to the amendment, the defendant could be held liable only upon a clear showing of actual knowledge of the falsity of the claims.

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4. In this case, the government argues that section 3730 involves substantive rights and that the section's 1986 amendments are, therefore, not retroactive.

After the amendment, however, a defendant could be held liable even if he had only "constructive knowledge" of the claim's falsity. Because the 1986 amendment affected the substantive rights of the defendant, this court ruled that the 1986 amendment to section 3729(a) was not retroactive.

Similarly, we believe that the amendments to section 3730 affect the substantive rights of both the *qui tam* and the government plaintiffs. Under the 1986 amendments to section 3730, *qui tam* plaintiffs enjoy greater rights under the Act. The amendments expand the circumstances under which citizens may bring false claims suits, and give *qui tam* plaintiffs more rights to participate in the litigation and a greater share in the recovery.[5] The amendments do not fall under *Bradley's* narrow exception of retroactivity. Because the amendments are not retroactive, the provisions that govern are those that were in effect at the time the

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5. For example, compare 31 U.S.C. § 3730(b)(3) (1982), which states, "If the Government proceeds with the action, the action is conducted only by the Government," with 31 U.S.C. § 3730(c) (1986). "If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2)." Furthermore, under the 1986 amendments, if the government wishes to dismiss the action, the government must give the *qui tam* plaintiff notice and the court must provide that plaintiff a hearing on the motion to dismiss. 31 U.S.C. § 3730(c)(2)(A) (1986). And *qui tam* plaintiffs now have limited rights to participate in discovery and at trial, and they can take a greater share in the recovery. Compare 31 U.S.C. §§ 3730(c)(1) and (2) (1982) with 31 U.S.C. §§ 3730(d)(1) and (2) (1986) Finally, the 1988 provisions now provide that "[i]f the person bringing the action is convicted of criminal conduct arising from his . . . role in the violation of [the Act], that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action." 31 U.S.C. § 3730(d)(3) (1988).

conduct that is the subject of this litigation occurred.[6] Thus, the 1982 provisions of the Act apply to this lawsuit because the conduct that gave rise to this suit, that is, TRW's overcharges, occurred prior to the 1986 amendments. The district court correctly applied the 1982 version of the Act.[7]

2. Dismissal of *Eagleye I*

Applying the 1982 provisions to *Eagleye I*, we now determine whether the district court erred when it dismissed the *qui tam* plaintiffs' claims for the reason that their claims were based on information already in the government's possession at the time the *qui tam* action was initiated. The court disposed of plaintiffs'

---

6. *See Kaiser Aluminum*, 494 U.S. at 855, 110 S. Ct. at 1586 (Scalia, J., concurring) ("the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place. . . .").

7. The district court issued its ruling that the 1982 provisions apply in its June 28, 1989 marginal order. The court, however, did not provide any analysis supporting its ruling. In a later order, it stated its reasoning for the June 28 marginal order:

> [T]he *qui tam* provisions in effect *at the time this action was initiated* shall be the applicable law, and the 1986 amendments . . . shall have no retroactive application. . . .

(Emphasis added.) But in *Eagleye II*, the court contradicted itself when it stated that it had already determined in *Eagleye I* that "the 1986 amendments do not apply to *pre-1986 conduct.*"

We believe that the district court simply misstated its rationale in *Eagleye I*. We conclude that the district court set forth the correct rationale for applying the 1982 provisions to both actions in *Eagleye II*.

claims against TRW in an order granting the government's "motion to dismiss." Nevertheless, we are satisfied that the court actually entered an order of summary judgment against the plaintiffs' claims because the court based its ruling on the uncontroverted evidence that, at the time plaintiffs filed their *qui tam* action, the government possessed information sufficient to enable it to investigate TRW's false claims. Thus, the district court concluded that, as a matter of law, plaintiffs were not entitled to recover under section 3730(c)(1) of the Act.

This court reviews the district court's grant of summary judgment *de novo*. *Brooks v. American Broadcasting Cos.*, 932 F.2d 495, 500 (6th Cir. 1991). Summary judgment is proper "if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc.*, 862 F.2d 597, 601 (6th Cir. 1988) (quoting Fed. R. Civ. P. 56(c)). "Material" facts are those that might affect the outcome of the suit under the governing law and do not include factual disputes that are irrelevant or unnecessary. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). The dispute must also be "genuine"; that is, it must concern evidence upon which the jury could return a verdict for the nonmoving party. *Id.*

Upon review of all the papers pertinent to the motion for summary judgment, and viewing the evidence in a light most favorable to the nonmoving party, *id.* at 255, 106 S. Ct. at 2513, we must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* 251-52, 106 S. Ct. at 2512. Thus, "[t]he inquiry performed is the threshold

inquiry of determining whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250, 106 S. Ct. at 2511.

As an initial matter, we note that the government is incorrect when it argues that sections 3730(b)(4) and (c)(1) require *dismissal* of the plaintiffs as parties to the action. The 1982 version of these provisions reads as follows:

> [(b)] (4) Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.
>
> (c)(1) If the Government proceeds with the action, the person bringing the action may receive an amount the court decides is reasonable for disclosing evidence or information the Government did not have when the action was brought. The amount may not be more than 10 percent of the proceeds of the action or settlement of a claim and shall be paid out of those proceeds.

31 U.S.C. §§ 3730(b)(4) and (c)(1) (1982). The government argues that because plaintiffs' claims were based on information already in the possession of the government at the time the action was brought, sections 3730(b)(4) and (c)(1) (1982) require dismissal of the plaintiffs from this action. The plain language of the provisions, however, does not support this conclusion, for neither

provision refers to the dismissal of parties. Section 3730(b)(4) (1982) bars a district court from exercising jurisdiction over an *action* brought by an individual if: 1) the government decides not to proceed with an action; and 2) the action is based on information already in the government's possession at the time suit was filed. The provision says nothing about dismissing parties. Similarly, section 3730(c)(1) (1982) does not give the district court authority to dismiss a party. It refers to the amount a plaintiff may recover depending on what the court decides is reasonable. Thus, these sections do not provide a basis for dismissing the plaintiffs from the lawsuit.[8]

After carefully reviewing the district court's order, we are satisfied that the district court did not dismiss the plaintiffs on the basis of the jurisdictional bar of section 3730(b)(4) (1982). Rather, the court reviewed the evidence, determined that material facts were not in dispute, and concluded that, as a matter of law, under section 3730(c)(1) (1982) plaintiffs were not entitled to a reasonable informer's fee. We believe that the district court acted

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8. Although the more recent amendments do not apply to *Eagleye I*, we note that the relevant 1986 amendments also do not authorize the dismissal of any party. *See* 31 U.S.C. §§ 3730(d)(1), and (e)(4)(A) (1986). The only provision of the Act that addresses the dismissal of parties is a 1988 amendment that provides in part:

> If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of [the Act], *that person shall be dismissed from the civil action* and shall not receive any share of the proceeds of the action.

31 U.S.C. § 3730(d)(3) (1988) (emphasis added). This provision does not govern the dispute before us.

appropriately when it entered judgment against the *qui tam* plaintiffs on this basis.

The government bears the burden of establishing that plaintiffs' lawsuit was based on information and evidence in possession of the government at the time the action was filed. As the district court found, the government submitted to the court two reports that had been authored by TRW officials and addressed to the Department of Defense in November 1984 and February 1985. The reports detailed the "padding" and other pricing irregularities committed by TRW that resulted in overcharges to the government. These two reports provide evidence that the government was aware of TRW's illegal conduct by November 1984. The *qui tam* plaintiffs did not file this false claims suit untill April 1986. Evidence shows that subsequent to TRW's report to the Justice Department but prior to filing the *qui tam* suit, plaintiffs provided the government with more detailed information about TRW's misconduct. This however, does not controvert the evidence showing that the government was aware of TRW's actions prior to the initiation of the *qui tam* plaintiffs' false claims suit.

The evidence possessed by the government need not be a " 'mirror image of that in the hands of the *qui tam* plaintiff.' " *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100, 1103 (7th Cir. 1984) (citation omitted). Rather, the evidence need only be " 'sufficient to enable [the government] adequately to investigate the case and to make a decision whether to prosecute.' " *Id.* (bracked material in original) (citation omitted). The *qui tam* plaintiffs fail to present any evidence to contradict the government's evidence, which established that it was aware of TRW's conduct. Consequently, the *qui tam* plaintiffs raise no genuine issue of material fact requiring resolution by the trier of fact.

We believe that the district court correctly concluded, as a matter of law, that plaintiffs are not eligible to collect an informer's fee. We therefore affirm the district court's judgment order.

III. *Eagleye II*

A.

We now turn to Eagleye's appeal in *Eagleye II*. On August 12, 1987, Eagleye filed a second False Claims Act suit (*Eagleye II*). This time, the plaintiff named TRW and GE as defendants. The complaint, like the complaint in *Eagleye I*, alleged that TRW and GE conspired to defraud the government on a number of Defense Department contracts between 1979 and 1984. The complaint further alleged that TRW engaged in other fraudulent acts alone and with GE that resulted in the presentation of false claims to the government.

On January 11, 1988, the government exercised its option under section 3730(b)(2) to intervene as plaintiffs. The government also moved to dismiss the *qui tam* plaintiffs from the *Eagleye II* action arguing that: 1) the complaint was based on allegations or transactions that were already the subject of *Eagleye I*, in violation of 31 U.S.C. § 3730(e)(3) (1988), which prohibits a person from bringing an action based on allegations that are the subject of a civil suit in which the government is already a party; and 2) the filing of the complaint was in direct violation of the July 31, 1986 stipulation and order entered in *Eagleye I*. The government also moved for voluntry dismissal under Fed. R. Civ. P. 41(a).[9]

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9. Rule 41 governs voluntary dismissal and provides in part:

(Cont'd)

Appendix D

On November 30, 1990, the district court granted the government's motion to dismiss. The district court ruled, however, that the 1986 and 1988 amendments to the Act do not apply to this action because the action involves conduct that occurred before the amendments were enacted. Instead, the court considered the government's motion under the 1982 Act provisions and found dismissal proper under sections 3730(b)(1) and (3) (1982) because the government and the court consented to dismissal.[10] Eagleye filed a timely motion to alter or amend the district court's judgment pursuant to Fed. R. Civ. P. 59(e). The court denied the motion to alter or amend, and Eagleye filed a timely appeal.

(Cont'd)

> [A]n action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.

Fed. R. Civ. P. 41(a)(2).

10. Section 3730(b)(1) provides in part:

> An action may be dismissed only if the court and the Attorney General give written consent and their reasons for consenting.

31 U.S.C. § 3730(b)(1) (1982). And section 3730(b)(3) provides:

> If the Government proceeds with the action, the action is conducted only by the Government. The Government is not bound by an act of the person bringing the action.

31 U.S.C. § 3730(b)(3) (1982).

Appendix D

B.

Eagleye argues that *Eagleye II* was filed in 1987 and that the 1986 amendments, which were in effect at the time the lawsuit was filed, apply to his cause of action. According to Eagleye, the 1986 provision[11] entitle him to a hearing on the government's motion to dismiss.

The district court correctly determined, however, that the 1982 provisions apply because *Eagleye II*, although filed in 1987, was based on TRW's conduct, which occurred prior to the enactment of the 1986 amendments. As it did in *Eagleye I*, the government decided to proceed with Eagleye's false claim action. According to the 1982 provisions, the government assumed full control over the litigation and could dismiss the action as long as the court and the Attorney General provided written consent to the dismissal. *See* 31 U.S.C. § 3730(b)(1) (1982). A hearing was not required under the 1982 provisions, and both the government and the district court consented to dismissal. Consequently, we conclude that the district court did not err when it granted the government's motion to dismiss *Eagleye II*.

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11. Specifically, section 3730(c)(2)(A), which provides:

> The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

31 U.S.C. § 3730(c)(2)(A) (1986).

Appendix D

IV.

For these reasons, we AFFIRM the decisions of the district court.

ORDER

Upon consideration of appellant Eagleye's motions to file petition for rehearing en banc out of time and to exceed the page limit; motion to recall the mandate, and; motion to vacate this court's order of September 21, 1993,

And upon further consideration of the appellee USA's response in opposition to the motions to vacate and recall the mandate,

It is ORDERED that the motions be and hereby are denied.

APPENDIX E — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 23, 1993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos: 91-3784 : 92-3066

UNITED STATES OF AMERICA,

Plaintiffs-Appellee,

LARRY S. EAGLEYE (91-3784 / 92-3066);
ALAN RUSS and CHARLES BROOME (92-3066),

Plaintiffs-Appellants.

v.

TRW, INC. (91-3784 / 92-3066);
GENERAL ELECTRIC COMPANY (91-3784),

Defendants-Appellees.

Before: Ryan and Suhrheinrich, Circuit Judges; and
Peck, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

Appendix E

ON CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

A True Copy.

Attest:

s/ Vlino Fields
Deputy Clerk

Issued as Mandate: September 29, 1993

COSTS: None

Filing Fee..... $
Printing.....$

Total.....$

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MARCH 8, 1993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No: 91-3784: 92-3066

UNITED STATES OF AMERICA;

Plaintiff - Appellee

LARRY S. EAGLEYE

Plaintiff - Appellant

v.

TRW, INC.; GENERAL ELECTRIC COMPANY

Defendants - Appellees

Upon consideration of appellees' motion to enlarge the time for oral argument to thirty minutes to be shared among the three appellees,

It is ORDERED that the time for oral argument is enlarged. Appellees will have a total of twenty (20) minutes to be shared as they shall determine. Appellants will also have twenty (20) minutes.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MAY 21, 1992

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 91-3784/92-3066

UNITED STATES OF AMERICA;

Plaintiff-Appellee

ex. rel. LARRY S. EAGLEYE (91-3784/ 92-3066); ALAN RUSS (92-3066); CHARLES BROOME (92-3066),

Plaintiffs-Appellants

v.

TRW, INC; GENERAL ELECTRIC COMPANY

Defendants-Appellees.

BEFORE: JONES and GUY, Circuit Judges; and JOINER, Senior District Judge.*

The individual plaintiffs appeal the district court's judgment in this action under the False Claims Act which dismissed them as parties and allowed the United States to take over prosecution of the action. They also appeal the dismissal of a similar action subsequently filed. The United States now moves to file three

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* The Honorable Charles W. Joiner, U.S. Senior District Judge for the Eastern District of Michigan, sitting by designation.

documents under seal in a separate appendix. The plaintiffs do not oppose the motion, but ask that they be allowed a copy of one of the documents, an affidavit of the assistant government attorney. The plaintiffs also move to file in a separate appendix, under seal, the transcript of an interview with plaintiff Larry Eagleye. The government has not responded.

Upon consideration, it is ORDERED that both motions to file separate appendices under seal are granted. The plaintiffs' request to be provided a copy of the government attorney's affidavit is denied, without prejudice to their right to renew that request before the panel that will determine this appeal on the merits.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Clerk

APPENDIX H — MEMORANDUM OF OPINION AND ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS FILED NOVEMBER 30, 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JUDGE ALVIN I. KRENZLER

CASE NO. C87-2088

UNITED STATES OF AMERICA ex rel. LARRY EAGLEYE

Plaintiff

-vs-

TRW INC. GENERAL ELECTRIC COMPANY

Defendants

MEMORANDUM OF OPINION AND ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS

The present *qui tam* action was filed in 1987 pursuant to 31 U.S.C. §§ 3729, *et seq.*, the False Claims Act. The action was filed by the Relator, Larry Eagleye, and subsequently taken over by the government pursuant to 31 U.S.C. § 3730(b)(2). This case is presently before this Court on the government's motion to dismiss. A brief procedural history of this case and a related case is helpful to understand the background of this action.

In 1986, an earlier action was brought by the Relator, Larry Eagleye, (Relator) on behalf of the United States of America pursuant to 31 U.S.C. §§ 3729, *et seq.*, the False Claims Act. That action was styled *United States of America, ex rel. Larry S. Eagleye v. TRW Inc. et al.*, Case No. C86-1262, (hereinafter

"Eagleye I"). In that complaint the Relator alleged that between the years 1979 and 1984, the defendants, TRW and General Electric (GE), defrauded the United States government in a number of contracts with the Department of Defense. The complaint also alleged numerous other claims against TRW, and two other defendants, United Technologies, and Iscar Blades, Ltd. Pursuant to the False Claims Act, the government took over that case and filed an amended complaint. The government's amended complaint removed all the defendants except TRW. The government referred the remaining claims raised in the Relator's complaint to the Office of the Inspector General for further investigation. The government then amended the complaint a second time in an attempt to take advantage of amendments to the False Claims Act which were enacted in October 1986, after the original complaint and the first amended complaint were filed.

These statutory amendments made significant and substantive changes in several aspects of the False Claims Act. In a recent opinion and order, this Court dismissed the government's second amended complaint in "Eagleye I," without prejudice, upon a finding that the 1986 amendments do not apply to pre-1986 conduct. *See* "Eagleye I," Case No. C86-1262, Memorandum and Order Granting Defendant's Motion to Dismiss Second Amended Complaint.

In 1987, the Relator filed the complaint presently before this Court on behalf of the government pursuant to the False Claims Act. 31 U.S.C. §§ 3729, *et seq.* In the present action the Relator reasserted the claims against GE which the government had dropped from "Eagleye I." The present claims also relate to the events which took place between 1979 and 1984.

The government took over this case pursuant to 31 U.S.C.

§ 3730(b)(2), and moved to dismiss because the present action consists of the same claims which the government had removed from the earlier action in order to further investigate them. 31 U.S.C. § 3730(e)(2)(B)(3). In the alternative, the government moved for a simple voluntary dismissal of the case because it had not satisfied itself, through it's investigation, that it had a colorable claim against GE. The Relator opposed the motion to dismiss and demanded a hearing on the motion pursuant to the amendments to the False Claims Act. 31 U.S.C. § 3730(c)(2)(A). This Court denies the Relator's request for a hearing and grants the government's motion to dismiss for the reasons stated herein.

Prior to the October 1986 amendments to the False Claims Act, a Relator had no input in the course of the case once the government took it over. The Act provided that:

> An action may be dismissed only if the court and the Attorney General give written consent and their reasons for consenting.
>
> * * *
>
> (3) If the Government proceeds with the action, the action is conducted only by the Government. The Government is not bound by an act of the person bringing the action.

31 U.S.C. § 3730(b)(1) and (3). Therefore, it was possible for an action to be dismissed against the Relator's wishes so long as the government and the court consented.

In an apparent effort to prevent abuse of the government's power to take over a case and then dismiss it, Congress enacted

amendments to the False Claims Act. These amendments greatly expanded the role of the Relator in the action after the government took over. Pursuant to the amendments, the Relator remains an active party to the action unless the government shows that the Relator's unrestricted participation in the action interferes with the government's prosecution of the case. 31 U.S.C. § 3730(c)(2)(C). Only upon that showing may the court order limitations on the participation of the Relator. 31 U.S.C. § 3730(c)(2)(D). Moreover, an action can no longer be dismissed by the government without affording the Relator a hearing on the motion to dismiss. 31 U.S.C. § 3730(c)(2)(A).

In the present case, the Relator requested a hearing in his brief in opposition to the government's motion to dismiss, and sent a letter to this Court which shall be treated as a motion for a hearing on the government's motion to dismiss pursuant to the 1986 amendment. 31 U.S.C. § 3730(c)(2)(A). However, in dismissing the second amended complaint in "Eagleye I," this Court has already ruled that the 1986 amendments shall not apply to conduct which occurred before the amendments were enacted. Therefore, this Court shall apply the pre-October 1986 law to the case at bar.

To voluntarily dismiss a case under the pre-October, 1986 False Claims Act, it was only necessary that the government and the court consent to its dismissal. The Relator was not entitled to a hearing. In the present case, the government has evidenced its consent to dismissal by filing a motion to dismiss. This Court evidences its consent to dismissal by dismissing the action. The consents of the government and this Court, standing alone, are sufficient under the pre-October 1986 statute, to dismiss this action.

However, even if it were necessary to show more than mere

consent on the part of both the government and this Court, the history of this case supplies justification for its dismissal by government motion. The fact that the government did not believe itself to have sufficient information to pursue these claims in 1986 when "Eagleye I" was filed, and referred them instead for further investigation, is sufficient reason to grant its motion to dismiss now. This Court will not force the government to bring an action based upon facts about which the government is aware but has already made the decsion to investigate further.

When the government has completed its investigation, it may chose to bring the action or not bring it depending upon what evidence is uncovered. However, once the Relator filed "Eagleye I" the government had the right to remove GE from the case until the government was prepared to include it. The government's motion to dismiss in this case informs this Court that the government is not yet prepared to bring a false claims action against GE. For the foregoing reasons, the government's motion to dismiss without prejudice is granted.

s/ Alvin I. Krenzler
UNITED STATES DISTRICT JUDGE

Marcia Johnson
Henry Hentemann

Appendix H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. C86-1262

JUDGE ALVIN I. KRENZLER

UNITED STATES OF AMERICA ex rel. EAGLEYE, et al.

Plaintiff

-vs-

TRW INC.

Defendant

ORDER OF DISMISSAL

The Court, having separately filed its Memorandum of Opinion and Order Granting Plaintiff's Motion to Dismiss Relators, hereby dismisses, with prejudice, each of the three relators, Larry S. Eagleye, Charles W. Broome, and Alan J. Russ, from this action.

s/ Alvin I. Krenzler
UNITED STATES DISTRICT JUDGE

Henry Hentemann
Leonard Carr
Marcia Johnson
Gerald Palmer

APPENDIX I — UNSEALING ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION FILED NOVEMBER 30, 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. C87-2088

UNITED STATES OF AMERICA ex rel. LARRY EAGLEYE

Plaintiff

-vs-

TRW INC., et al.

Defendants

UNSEALING ORDER

JUDGE ALVIN I. KRENZLER

The present action was filed by Relator, Larry Eagleye, on behalf of the United States of America, pursuant to 31 U.S.C. §§ 3729, *et seq.*, the False Claims Act. This action was filed under seal pursuant to the statute.

The government then took over the case. Once the government has taken over the case, there is no valid reason to maintain the case under seal in the absence of a court order.

Therefore, the sealing order is removed, vacated and held for naught and the case is now a matter of public record.

Appendix I

s/ Al I. Krenzler
UNITED STATES DISTRICT JUDGE

Marcia Johnson
Henry Hentemann

APPENDIX J — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION FILED NOVEMBER 30, 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. C86-1262

UNITED STATES OF AMERICA ex rel.
LARRY EAGLEYE, et al.

Plaintiff

-vs-

TRW INC.

Defendant

JUDGE ALVIN I. KRENZLER

MEMORANDUM OF OPINION AND ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS RELATORS

On April 4, 1986, the relators, Larry S. Eagleye, Charles W. Broome, and Alan J. Russ, filed the above-captioned *qui tam* action on behalf of the plaintiff, United States of America, against various defendants including TRW Inc.

On June 3, 1986, the United States filed its notice of appearance as the plaintiff in this action, pursuant to 31 U.S.C. § 3730(b)(3) (1982). The United States filed its first amended complaint on July 31, 1986, naming TRW as the sole defendant. on July 7, 1989, the United States filed its second amended complaint.

Appendix J

The United States has moved this Court for an order dismissing the relators from this action. Relators Broome and Russ have jointly filed a memorandum in opposition to the motion while relator Eagleye individually filed his memorandum in opposition. The defendant, TRW, filed a memorandum in support of the government's motion to dismiss the relators.

Pursuant to 31 U.S.C. §§ 3730(b)(4) and (c)(1) (1982), the Court finds that the relators' claims were based on information and evidence which the United States possessed when this action was initiated. As such, the relators are not eligible for the informer's fee under the *qui tam* provisions. Accordingly, the Court grants the United States' motion to dismiss each of the three relators from this action.

UNITED STATES' MOTION TO DISMISS THE RELATORS

The United States has moved for dismissal of the relators for the following three reasons. First, the United States argues that 31 U.S.C. §§ 3730(b)(4) and (c)(1) (1982) require the dismissal of the relators where the relators' claims are based upon evidence and information the government had when the action was brought. Second, the United States argues that if the Court should find that the recent amendments to the *qui tam* provisions apply retroactively, the relators should be dismissed, pursuant to 31 U.S.C. § 3730(e)(4)(A) (1988), because the action is based upon the public disclosure of allegations from the news media. In any event, the United States argues that two of the three relators, namely, Eagleye and Broome, should be dismissed, pursuant to 31 U.S.C. § 3730(d)(3) (1988), because this provision requires dismissal of persons who have been convicted of crimes in connection with the fraud alleged in a *qui tam* case.

Appendix J

The first of the United States' arguments concerns the *qui tam* provisions as they existed at the time this action was initiated while the second and third arguments involve the *qui tam* provisions as they were amended subsequent to the filing of this action. On June 28, 1989, this Court ruled that the *qui tam* provisions in effect at the time this action was initiated shall be the applicable law, and the 1986 amendments to the *qui tam* provisions and any further amendments shall have no retroactive application to this action. Accordingly, the Court has only considered the first of the United States' three arguments.

The United States' first argument is as follows: If the United States can demonstrate that this action is based upon information and evidence in possession of the government at the time the action was filed, then 31 U.S.C. §§ 3730(b)(4) and (c)(1) require the dismissal of the relators from this action. Section 3730(b)(4) states, "[u]nless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought," while section 3730(c)(1) reads, in pertinent part, "[i]f the Government proceeds with an action, the person bringing the action or settling the claim may receive an amount the court decides is reasonable for disclosing evidence or information the Government did not have when the action was brought."

The relators argue that § 3730(b)(4) does not apply to this case because this provision only applies where the United States declines to enter an appearance. The relators further argue that they are not parties, and, therefore, they can not be dismissed.

The question presented by this motion is whether the relators should be dismissed if their suit was based upon information and

evidence in the possession of the United States when this action was filed.

In their memoranda and at the hearings, the United States relied on *United States ex rel. Bayarsky v. Brooks*, 110 F. Supp. 175 (1956). Therein, the relator brought a *qui tam* action, and the United States entered an appearance, thereby taking over the litigation as provided for by the statute. *Id.* at 176. After the United States and the defendants had entered into a settlement agreement, the Court held a hearing to address the issue of the relator's right to his whistleblower's fee. *Id.* at 177. The Court held that where the relator had based his suit upon information and evidence in the possession of the United States at the time the action was filed, the relator was not entitled to an informer's fee under the *qui tam* provisions. *Id.* at 179. Where the United States makes an appearance in a *qui tam* suit and is either successful on the merits or obtains a settlement, the United States makes an appearance in a *qui tam* suit and is either successful on the merits or obtains a settlement, the United States must reward the relators out of the proceeds. However, such a reward is only necessary where the relator has contributed original information in bringing the suit. Conversely, where the relator's suit is based upon information and evidence in possession of the United States at the time the suit is initiated, the relator is entitled to no reward.

Also, in their memoranda and at the hearings, the United States relied on *United States v. Pittman*, 151 F.2d 851 (5th Cir. 1945), *cert. denied*, 328 U.S. 843 (1946). In *Pittman*, the action was initiated by the relator, and, as required by the statute, the relator gave notice of his *qui tam* suit to the United States. *Id.* Thereafter, the United States entered an appearance. *Id.* The defendant therein moved to dismiss the entire action, pursuant to

31 U.S.C. § 232[1], because the relator has not disclosed any original information or evidence to the United States. *Id.* The Court held that the jurisdictional bar contained in § 232 was not available to the defendant. *Id.* at 853-54. Section 232 was not intended, the court reasoned, to provide defendants with protection from prosecution nor was it supposed to nullify just claims of the United States when it takes over the case. *Id.* at 854. Rather, it was intended to discourage the carrying on of suits by undeserving relators. *Id.* Accordingly, the court held that the defendant would not be entitled to seek dismissal of the entire action pursuant to § 232.

It is established that when the government declines to make an appearance, it can invoke § 3730(b)(4) to prevent a relator from prosecuting a *qui tam* suit where the relator's suit was based upon information and evidence in possession of the government at the time the relator filed the action. For example, in *United States v. Aster,* 275 F.2d 281, 282 (3rd Cir. 1960), *cert. denied* 364 U.S. 894 (1960), the court held that where the essential information upon which the relator had based his *qui tam* action was in the possession of the United States prior to the relator's filing of his suit, the government may move to dismiss the relator even though the government has declined to enter an appearance.

The relators argue that where the government enters an appearance and assumes control of the action, it may not seek dismissal of the relators even if the relators' action was based upon information and evidence in possession of the government at the time the action was filed. This is a distinction without a difference. If the relators' suit was based on information already in possession of the government when the relators' filed this action, then there is

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1. 31 U.S.C. § 232 was the previous codification of 31 U.S.C. § 3730(b)(4) (1982).

no reason for the relators to remain in this action as they are not eligible for the informer's fee. 31 U.S.C. § 3730(c)(1).

Section 3730(c)(1) states that a relator is only eligible for the informer's fee when the information and evidence upon which the relator's complaint is based is not in possession of the government at the time the suit was initiated. Section 3730(b)(4) states that unless the government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the government had when the action was brought. In construing this language, a common impression may be that if the relator possessed the information and then gave it to the government, the relators would still be eligible to collect his informer's fee if they filed a *qui tam* action. However, courts have interpreted this language to mean the relators cannot maintain a *qui tam* action where the government possessed the information at the time the relators filed the suit. In fact, where the relator knew the information before the government did, informed the government of such information, and then filed the *qui tam* action, the relator was dismissed because the government possessed the information at the time the suit was filed even though it obtained the information from the relator. *Aster,* 275 F.2d at 283; *See also United States ex rel. State of Wisconsin v. Dean,* 729 F.2d 1100 (7th Cir. 1984). The thrust of the *qui tam* provisions is to reward deserving relators. However, if the relators want to protect their interest in an informer's fee, they should proceed immediately with their *qui tam* action instead of first disclosing such information to the government. If the relators give their information to the government before they file a *qui tam* action, then the government had the information at the time the *qui tam* action was filed, and the relators could be eliminated.

Under the 1982 *qui tam* statute, where the relator has based his suit upon information and evidence in the government's

possession at the time the suit was filed, the relator has no reason to remain in such a position and should be dismissed from the action. Perhaps, this language was one of the flaws of the 1982 statute because under the *qui tam* provisions as amended in 1986 and 1988, there is no such language. Under the new statute, relators may participate in the *qui tam* litigation even where the government enters an appearance and may be rewarded based upon their contribution to the prosecution of the case. However, the newly amended statute does not apply in this case. Accordingly, so long as the government can show that it possessed the information at the time the relators filed their suit, the relators may be dismissed.

In order for the relators to be dismissed from this suit, the government has the burden of showing that the relators' action was based upon information and evidence in possession of the government at the time this action was filed. The standard used to determine whether the relators' action was based upon information and evidence already in the possession of the government is set out in *Dean*, 729 F.2d at 1103. Therein, the court held that the evidence which the government possessed need not be a "mirror image of that in the hands of the *qui tam* plaintiff." *Id.* at 1103 (quoting *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 678 (9th Cir. 1978)). The evidence and information need only be "sufficient to enable [the government] adequately to investigate the case and to make a decision whether to prosecute." *Id.*

After the government assumed control of the litigation, it omitted many of the relators' allegations when it amended the complaint. Under the *qui tam* provisions as they existed at the time this suit was filed — 31 U.S.C. § 3730 (1982), once the government entered its appearance, the government had unfettered discretion to control the litigation. The government is free to amend the complaint filed by the relators and, in so doing, delete claims advanced by the relators, and the relators are defenseless.

Appendix J

In the instant action, when the government amended the relators' complaint, it stated in a supporting memorandum that only some of the relators' original claims would be re-asserted in the amended complaint while others would be dropped from the suit and referred to the Department of Defense Inspector General for further investigation. This unfettered discretion in the hands of the government was one of the weaknesses of the 1982 statute, and this discretion, in fact, was dramatically reduced in the amended *qui tam* provisions. Congress amended the *qui tam* provisions in 1986 and again in 1988 to provide the relators with rights. One of the relators' newly acquired rights permits the relators to continue as a party and participate in the litigation after the government enters an appearance. 31 U.S.C. § 3730 (1988). However, the amended version is not applicable in this action; rather, the 1982 statute applies to this action. Under this version, the government had unfettered discretion to control the litigation. Once the government drops certain claims and refers them to governmental agencies for further investigation, such claims are no longer part of this case and, accordingly, will not be considered by the Court. If the relators would have any right to share in the proceeds, it would be limited to that portion of the proceeds attributable to the allegations which the government has re-asserted in its amended complaint. The relators originally alleged that TRW artificially inflated prices on various TRW component parts and/or products, including but not limited to TF39 program, by manipulating the routing system. These are the only allegations re-asserted by the government in the second amended complaint. If the government can demonstrate that it possessed this information at the time the relators filed their suit, the relators are not eligible for an informer's fee and may be dismissed.

The government argues that it has made a sufficient showing that it possessed the relevant information when the relators filed this action. The United States has submitted two reports to the

Court in support of its motion. Each report was prepared by William R. Phillips, Vice President and Senior Counsel, TRW, and addressed to Joseph H. Sherick, Inspector General, Department of Defense. Each report was prepared with the assistance of TRW's legal department, outside legal counsel, and outside auditors and was submitted to the Departments of Defense and Justice. The first was dated November 28, 1984, while the second was dated February 28, 1985. In general, the 1984 report addressed irregularities at the Compressor Components Division of TRW's Aircraft Components Group, and the 1985 report updates the findings of the earlier report. The November 1984 report informed Inspector General Sherick that certain routings had been "padded" with labor costs that were not necessary for the manufacture of the part and which were, in fact, not performed in the manufacture of that part. The report stated that TRW personnel unreasonably increased the standard labor hours used in the manufacture of certain components including the TF39 Stage 1 Fan Blade. The 1985 report discussed new findings concerning overcharges to the government in the Component Compressor Division as well as in the Power Accessories Division of TRW's Aircraft Components Group. The government also submitted the affidavit of Christian Stickan, Assistant United States Attorney, who conducted the criminal investigation of this matter. Therein, Assistant United States Attorney Stickan stated that in November 1984, he as well as officials from the Departments of Justice and of Defense were aware of the "padded" routings used by TRW to inflate the prices charged to the United States.

The relators have alleged that the information upon which the relators based their suit was not in possession of the United States at the time the suit was filed. The relators assert four arguments in support of this position. The relators argue that the government did not possess the information before the suit was filed; rather, it obtained the information from the voluminous materials submitted

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by the relators at the time the action was filed. This argument is unpersuasive because the government has submitted two internal reports demonstrating that it was aware of TRW's illegal conduct as early as November 1984. The materials submitted by the relators do not controvert the fact that the government was aware of irregularities at TRW before this action was filed.

Second, the relators argue that once they filed the action, the government interviewed the relators in an effort to gather information so as to make a decision whether to intervene in this matter and prosecute the case. That the government interviewed the relators after the action was filed does not controvert the fact that the government possessed information regarding the "padded" routings used to inflate prices charged to the government before the relators filed their action. The interviews may have added to the government's knowledge, but if the government can demonstrate that it possessed the information at the time the suit was filed, then the relators may be dismissed.

Third, relator Eagleye argues that the internal reports prepared by TRW were incomplete and intentionally misleading. Further, the reports did not inform the government of all of the methods and means as well as the extent of the fraud at TRW. Relator Eagleye has submitted a copy of a transcript concerning testimony he had given to the Department of Justice regarding misleading and inconsistent statements in TRW's internal reports. The government's information need not be the "mirror image" of that possessed by the relators. Instead, it must be information sufficient to enable the government to investigate the matter adequately and make the decision whether to prosecute. Even if the government's information is incomplete, the government will be deemed to possess to information so long as it is ample enough to provide a basis to investigate and to decide whether to prosecute.

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Fourth, relator Eagleye argues that without his help and the help of the other relators, the government's invenstigation would have been severly hindered. In support of this proposition, relator Eagleye has submitted copies of two letters written to United States District Judge George W. White regarding the criminal charges against Eagleye. One of the letters was written by Allen J. Ross, former Chief of the Civil Division for the United States Attorney, Northern District of Ohio, and it concerned Eagleye's cooperation with the government investigators. The second letter was written by the Honorable John D. Dingell, Chairman, Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of the House of Representatives, and it concerned Eagleye's cooperation in testifying before the Subcommittee on March 4, 1987. Each of the letters stated that Eagleye cooperated fully, and that his testimony was helpful in understanding a complex situation. It may very well be true that the government's investigation would have been dramatically hindered without help of the relators; however, if the government can demonstrate that it possessed information sufficient to investigate and pursue the matter, then the relators may be dismissed. That the relators cooperated with the government after the *qui tam* action was filed does not controvert the evidence presented by the government that it possessed enough information in November 1984 to enable it to conduct an investigation and make a decision whether to prosecute.

After reviewing the arguments of both sides and the evidence submitted in support of their respective positions, the Court is satisfied that the relators' suit was based upon information and evidence in possession of the government at the time the relators filed the suit. Based upon the two TRW reports, the government possessed enough information in 1984-85 to enable it to conduct an investigation and to make a decision whether to prosecute the case.

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The relators also argue that they are not parties in this action because the United States assumed control of the suit, and, therefore, that they can not be dismissed at this juncture of the litigation. This argument is not well taken. To keep the relators in this action where they are not eligible to receive an informer's fee is aimless and without meaning. The government was aware of the labor overcharges and the manipulation of the routing system in the years 1984-85; accordingly, the relators are not eligible to collect an informer's fee and are dismissed from this action.

s/ Alvin I. Krenzler
UNITED STATES DISTRICT JUDGE

Henry Hentemann
Leonard Carr
Marcia Johnson
Gerald Palmer

APPENDIX K — ORDER DISPOSING OF UNRULED-ON MOTIONS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION FILED NOVEMBER 30, 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JUDGE ALVIN I. KRENZLER

CASE NO. C86-1262

UNITED STATES OF AMERICA ex rel. LARRY EAGLEYE

Plaintiff

-vs-

TRW INC., et al.

Defendants

ORDER DISPOSING OF UNRULED-ON MOTIONS

A final judgment has been entered in this case. Accordingly, the Court overrules as moot all motions pending at the time judgment was entered, if any.

s/ Alvin I. Krenzler
UNITED STATES DISTRICT JUDGE

Henry Hentemann
Leonard Carr
Marcia Johnson
Gerald Palmer

APPENDIX L — MOTION TO UNSEAL, DISCLOSE, REVIEW OF GRAND JURY DOCUMENTS AND TRANSCRIPTS FILED SEPTEMBER 15, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHEASTERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. C86-1262

JUDGE ALVIN I. KRENZLER

UNITED STATES OF AMERICA ex. rel. EAGLEYE, et al.

Plaintiffs

vs.

TRW, INC., et al.

Defendants

MOTION TO UNSEAL DISCLOSE, REVIEW OF GRAND JURY DOCUMENTS AND TRANSCRIPTS

Now comes Relator Larry S. Eagleye, by and through his attorneys, Meyers, Hentemann, Schneider & Rea Co., L.P.A., and hereby moves this Honorable Court pursuant to Rule 6(e)(3)(C)(i), of the Federal Rules of Criminal Procedure for an Order requiring the Department of Justice to unseal and disclose and produce specific portions of TRW Grand Jury transcripts and documentary evidence for use by the Relator in deposing Assistant United States Attorney, Christian H. Stickan; Jim Thomas of the Defense Criminal Investigative Services; and Joel Greenberg of the Defense Logistics Agency [see attached copy of Notice of

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Depositions and Subpoenas Duces Tecum which is attached hereto as Exhibit "A" and heretofore made a part hereof].

The Government has alleged in its Motion to Dismiss the Relators that it knew about the fraudulent over-pricing at TRW at the time that Relator Eagleye and the other Relators filed their False Claims Action against TRW in April of 1986.

The purpose of disclosing and producing of the Grand Jury documentary evidence and transcripts is to allow the Relators to show to the Court at the hearing on the Government's Motion to Dismiss that the Government did not know or knew very little of any or all of the methods, schemes, operating procedures and instances of all of the fraudulent over-pricing at TRW at the time Relators filed their False Claims Action in April of 1986.

A Brief in Support of the Motion to Disclose Grand Jury Documentary Evidence and Transcripts is attached hereto and heretofore made a part hereof.

Respectfully submitted,
MEYERS, HENTEMANN, SCHNEIDER
& REA CO., L.P.A.

By s/ Reginald P. Trubey, Jr.
Reginald P. Trubey, Jr.
U.S. District Court
I.D. No. 390023402
ATTORNEY FOR PLAINTIFF,
LARRY S. EAGLEYE
2121 The Superior Building
Cleveland, OH 44114
(216) 241-3435

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SERVICE

A copy of the foregoing Motion to Disclose Grand Jury Documentary Evidence and Transcripts was served upon the following by regular United States Mail, postage prepaid, this 15th day of September, 1989:

WILLIAM J. EDWARD, ESQ.
Acting United States Attorney
for the Northern Dist. of Ohio
1404 East 9th Street
Suite 500
Cleveland, OH 44114

MARCIA W. JOHNSON, ESQ.
Assistant United States Attorney
Chief of Civil Division
1404 East 9th Street
Suite 500
Cleveland, OH 44114
Attorney for the United States
Government

MICHAEL F. HURTZ, ESQ.
DAVID W. LONG, ESQ.
JOYCE R. BRANDA, ESQ.
HAROLD MALKIN, ESQ.
Assistant United States
Attorneys
Justice Department
P.O. Box 261
Ben Franklin Station
Washington, D.C. 20044

RICHARD B. CHANEY, ESQ.
Secretary of the Department
of Defense
Room 3E880
Pentagon
Washington, D.C. 20301-1000

GERALD W. PALMER, ESQ.
Jones, Day, Reavis & Pogue
North Point
901 Lakeside Avenue
Cleveland, OH 44114

LEONARD F. CARR, ESQ.
1392 SOM Center Road
Mayfield Heights, OH 44124

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Cleveland, OH 44114

MEYER, HENTEMANN, SCHNEIDER
& REA CO., L.P.A.

By s/ Reginald P. Trubey, Jr.
Reginald P. Trubey, Jr.
U.S. District Court
I.D. No. 390023402
ATTORNEY FOR PLAINTIFF,
LARRY S. EAGLEYE

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BRIEF

Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure provides for disclosure of Grand Jury material and transcripts and evidentiary evidence only upon a showing of "particularized need or "compelling necessity". *United States v. Sells Engineering Inc.*, 463 U.S. 418 at 443 (1983); *Douglas Oil Company v. Petro Stops N.W.*, 441 U.S. 211, 217-224 (1979); *Dennis v. United States*, 384 U.S. 855, 869-870 (1966); *United States v. Proctor and Gamble Co.*, 356 U.S. 677, 681-683 (1958).

The party seeking disclosure must demonstrate that the material is "needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that [the] request is structured to cover only the material needed." *United States v. Proctor and Gamble Co., Supra* at 682.

In establishing "particularized need" or "compelling necessity" one must demonstrate the following:

1. That the material is needed to avoid a possible injustice in another judicial proceeding;

2. That the need for disclosure is greater than the need for continued secrecy; and

3. That [the] request is structured to cover only the material needed.

The Government has alleged in its Motion to Dismiss the Relators that it knew about the fraudulent over-pricing at TRW at the time the Relators filed the False Claims Action against TRW in

April of 1986. This is to say that TRW allegedly reported to the Department of Defense and the Department of Justice [prior to the filing of the Relators' False Claims Action] all of the fraudulent over-pricing that occurred at the Compressor Component Division and Power Accessory Division of TRW.

When Relator Eagleye and the other Relators filed the False Claims Action against TRW and others, Relator Eagleye attached to the Complaint over two thousand (2,000) pages of TRW documents.

Also, after the filing of the False Claims Action by the Relators, Assistant United States Attorneys for the Civil Division of the United States Attorneys' Office for the Northern District of Ohio interviewed and took sworn testimony [one thousand one hundred twenty-five (1,125) pages] of Relator Eagleye concerning all of the methods, schemes, operating procedures and instances of fraudulent over-pricing at TRW [CCD & PAD Divisions]. See attached copies of Relator Eagleye's sworn testimony to the United States Government which is being filed under seal pursuant to the Department of Justice's mandate which are attached hereto cumulatively as Exhibit "B".

If it was not for the extensive help and cooperation of Relator Eagleye [and the other Relators] in the investigation of TRW by the Justice Department, the Government's efforts in the Civil False Claims Act case against TRW would have been severely hindered. See attached copy of letter dated June 24, 1988 of former Assistant United States Attorney, Chief of Civil Division, Alan J. Ross, to the Honorable George W. White which is attached hereto as Exhibit "C". Also, see a copy of the Honorable John D. Dingle, Chairman, Subcommittee on Oversight and Investigations of the House of Representatives letter of May 23, 1988 to the Honorable George White which is attached hereto as Exhibit "D".

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It would be an injustice for this Court not to unseal the TRW Grand Jury transcripts and documentary evidence and allow the Relator's counsel to review such statements and documents prior to the depositions of the aforementioned Assistant United States Attorneys and Department of Defense employees so that the Relators can demonstrate to the Court that the Government did not know or knew very little about any or all of the methods, schemes, operating procedures and instances of fraudulent overcharging at TRW at the time the Relators filed their False Claims Action against TRW. The Court must also determine the quality and quantity of information that was before the Grand Jury prior to the filing of the False Claims Action and after the False Claims Action was filed by the Relators.

Only by comparing what information and documentary evidence [including the quality of such evidence] that had been given to the Grand Jury prior to the filing of the Relators' False Claims Action with the sworn testimony of Relator Eagleye [and the other Relators] and the two thousand (2,000) pages plus of TRW documents provided by Relator Eagleye at the time of the filing of the False Claims Action against TRW can the Court determine what the Government knew as to all of the fraudulent practices of over-charging at TRW prior to the Relators filing their False Claims Action against TRW.

It will become evident from the Court's review of TRW's internal reports to the Government concerning its fraudulent over-charging and the sworn testimony of Relator Eagleye [and the other Relators] and the two thousand (2,000) TRW documents attached to the Relators' False Claims Action against TRW that TRW, did not, in fact, disclose to the Government all of its fraudulent over-charging that took place at CCD & PAD. In fact, TRW disclosed very little information to the Government and the quality of the information was very suspect and misleading.

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This is to say that TRW did not report to the Government in its internal reports the following fraudulent overcharging which occurred at CCD & PAD:

1. The fraudulent pricing of tooling to the Federal Government and hidden 820 Account.

2. The fraudulent and inconsistent processing of factory labor at TRW's Metallurgical Department.

3. The fraudulent over-charging of lots 10, 11 and 12 [for "the twelve month procurement of F100 compressor blades"] from TRW's Danville Plant in Danville, Pennsylvania.

4. The fraudulent contract negotiations between General Electric and TRW which took place in 1982 relative to General Electric's 1983 requirements concerning its jet engines, ie. compressor blades and fan blades.

5. The fraudulent negotiations and over-charging between GE and TRW concerning the pricing of the fan blades to be used in the B1 Bomber.

6. The fraudulent negotiations and over-charging with General Electric concerning CFM 56-case segments to be used in the KC-135 Tanker used by the United States Air Force and Navy.

7. All of the fraudulent acts at CCD Division, Group and/or Sector levels of TRW concerning FR costs, product line reporting, R.F.P.A. pricing and commodity P & L's.

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The second requirement under "particularized need" or "compelling necessity" is that the need for disclosure is greater than the need for secrecy.

As the Court is well aware, TRW has already plead guilty to Federal crimes and has been sentenced. As part of the Plea Agreement with the Government, TRW cannot be charged with any additional crimes arising out of fraudulent over-pricing at CCD & PAD. Also, the Grand Jury that investigated TRW has since been disempaneled.

In *Re: Shopping Cart Anti-Trust Litigation* 95 FRD 309 (1982) the Plaintiffs in an anti-trust action for disclosure of transcripts of Grand Jury testimony of witnesses in a previous criminal proceeding arising out of the same set of facts, the Court pointed out that:

> The Grand Jury had long since completed its investigation and had been discharged and that it appeared highly unlikely that there would be any further indictments or investigations relating to the alleged conspiracy or to price fixing during the relative time period. The possibility of potential Defendants escaping or interfering with the Grand Jury, its deliberations, or its witnesses, was therefore nil.

In *United States v. Colonial Chevrolet, Corp.*, 629 Fed.2d 943 (1980), cert den 450 U.S. 913, 67 L. Ed2d 337, 101 S.Ct 1352 the Court observed that:

> Where the Grand Jury proceedings are current,

> the reasons for secrecy will be overwhelming against the need for disclosure. "But" when the Grand Jury has "completed its work and the criminal proceedings initiated by the Grand Jury indictment have been concluded, the reasons for secrecy are substantially diminished and correspondingly the requirement of a showing of particularized need as a basis for disclosure is diminished."

In *Re: Grand Jury* (1978) 583 Fed.2d 128 the Court held that:

> After a Grand Jury's investigation has terminated, most of the reasons for Grand Jury secrecy are no longer applicable and the others are less compelling.

The Court in *Re: Grand Jury* concluded that permitting the disclosure of minutes of Grand Jury testimony sought by the Defendants in an anti-trust action fully respected the reasons given for the policy of secrecy of Grand Jury proceedings. The Court went on to reject the argument that the policy of secrecy should protect the Grand Jurors even after the proceedings had closed by preventing the embarrassing or detrimental disclosure of questions they may have asked or opinions they may have expressed during questioning. The Court further went on to state that such protection could be assured by providing for the excising of the names of the Grand Jurors from the transcript.

In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, reh den 310 U.S. 658 the Court observed that Grand Jury testimony is ordinarily confidential but said that after the Grand Jury's functions are ended, disclosure is wholly proper where the ends of justice require it.

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In *United States v. Ben Grunstein and Sons Co.*, 137 Fed Supp. 197 (1955), the Court citing *Socony-Vacuum Oil Co., Supra* held that:

> The specific question before the Court was whether the ends of justice required disclosure asked.

The third requirement under the standard of "particularized need" or "compelling necessity" is that the request is structured to cover only the material needed.

In this regard, attached hereto and heretofore made a part hereof as Exhibit "A" is a copy of Notice of Depositions and Subpoenas Duces Tecum which has been previously filed with this Court. The Relator only seeks information that he requested in the Subpoena Duces Tecum which was attached to his Notice of Deposition.

When this Court issues its Order unsealing the TRW Grand Jury transcripts and documentary evidence it can issue an Order that counsel for the Relators can only review such transcripts and documentary evidence at United States District Court and under the Court's supervision.

It would be a manifest injustice for this Court not to allow the Relators to review the specific portions of the Grand Jury transcripts and documentary evidence so that the Relators can demonstrate to the Court that the Government did not know of all of the fraudulent over-charging at TRW, and the quality of the known information was very suspect and misleading.

WHEREFORE, all of the requirements of "particularized

need" or "compelling necessity" having been met, this Court should issue an Order unsealing and disclosing to Relator's counsel the TRW Grand Jury transcripts and documentary evidence as aforementioned so that Relator's counsel can prepare for the depositions of Christian H. Stickan, Esq., Assistant United States Attorney; Jim Thomas, Defense Criminal Investigative Services; Joel Greenberg, Defense Logistics Agency; and Joyce R. Branda, Esq., Assistant United States Attorney.

Respectfully submitted,

MEYERS, HENTEMANN, SCHNEIDER & REA CO., L.P.A.

By s/ Reginald P. Trubey, Jr.
Reginald P. Trubey, Jr.
U.S. District Court
I.D. No. 390023402
ATTORNEY FOR PLAINTIFF,
LARRY S. EAGLEYE
2121 The Superior Building
Cleveland, OH 44114
(216) 241-3435

Appendix L

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO - EASTERN DIVISION

JUDGE ALVIN I. KRENZLER

CASE NO. C86-1262

UNITED STATES OF AMERICA, ex rel., LARRY S. EAGLEYE, et al.,

Plaintiffs,

v.

TRW, INC.,

Defendant.

NOTICE OF DEPOSITIONS

Notice is hereby given pursuant to 28-CFR sections 16.21, 16.22, 16.23 and section 16.24 and 32.CFR, that the undersigned will take the following depositions at the times and dates indicated below:

Tuesday, November 7, 1989

Christian H. Stickan, Esq., 9:00 A.M.
Assistant United States Attorney
1404 East 9th Street - Suite 500
Cleveland, Ohio 44114

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Wednesday, November 8, 1989

Jim Thomas 9:00 A.M.
Defense Criminal Investigative Services
1240 East 9th Street
Cleveland, Ohio 44199-0509

Thursday, November 9, 1989

Joel Greenberg 9:00 A.M.
Defense Logistics Agency -
Defense Contract Administers
1240 East 9th Street
Cleveland, Ohio 44114

Friday, November 10, 1989

Joyce R. Branda, Esq., 9:00 A.M.
c/o Marcia W. Johnson, Esq.
Assistant United States Attorney
Chief of Civil Division of the
U.S. Attorney Office for the
Northern District of Ohio
1404 East 9th Street - Suite 500
Cleveland, Ohio 44114

The depositions will be taken before a Notary Public at the offices of:

Meyers, Hentemann, Schneider & Rea
2121 Superior Building
815 Superior Avenue N.E.
Cleveland, Ohio 44114

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These depositions are taken pursuant to all applicable rules of the Federal Rules of Civil Procedure. The oral examinations will be continued from day to day until completed, and may be used in evidence on the trial of the above-captioned cause.

OF COUNSEL:

MEYERS, HENTEMAN,

SCHNEIDER & REA.

s/ Reginald P. Trubey
Reginald P. Trubey
2121 Superior Building
815 Superior Avenue N.E.
Cleveland, Ohio 44114
Attorney for Plaintiff
Larry S. Eagleye
Tel: (216) 241-3435

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Service of foregoing Notice by copy is acknowledged this 14th day of September, 1989.

_____

William J. Edward, Esq.,
Action United States Attorney for
the Northern District of Ohio
1404 East 9th Street - Suite 500
Cleveland, Ohio 44114

_____

Marica W. Johnson, Esq.
Assistant United States Attorney
Chief of Civil Division
1404 East 9th Street - Suite 500
Cleveland, Ohio 44114
Attorney for Plaintiff
United States Government

_____

Gerald W. Palmer, Esq.
Jones, Day, Reavis & Pogue
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Attorney for Defendant

Leonard F. Carr, Esq.
1392 SOM Center Road
Mayfield Heights, Ohio 44124
Attorney for Relators' Russ & Brome
CERTIFIED MAIL # P 099 352 999

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Michael F. Hurtz, Esq.,
David W. Long, Esq.,
Joyce R. Branda, Esq.,
Harold Malkin, Esq.,
Assistant United States Attorney
United States Department of Justice
P.O. Box 261
Ben Franklin Station
Washington, D.C. 20044
Attorneys for Plaintiff
United States Government
CERTIFIED MAIL # P 099 353 000

Richard B. Chaney, Esq.
Secretary of the Department of Defense
Room 3E880
Pentagon
Washington, D.C. 20301-1000
CERTIFIED MAIL # P 054 189 855

CERTIFICATE OF SERVICE

I certify that copy of foregoing Notice was hand delivered to William J. Edward, Esq., counsel for the Northern District of Ohio, Marcia Johnson, Esq., counsel for Plaintiff United States Government, Gerald W. Palmer, Esq., counsel for Defendant TRW, Inc. and sent Certified Mail to Leonard F. Carr, Esq., counsel for Relators' Russ & Brome and Michael F. Hurtz, Esq., David W. Long, Esq., Joyce R. Branda, Esq., Harold Malkin, Esq., counsel for Plaintiff United States Government, Richard B. Chaney, Esq., Secretary of the Department of Defense this 14th day September, 1989.

s/ Reginald P. Trubey
Reginald P. Trubey

Appendix L

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO - EASTERN DIVISION

JUDGE ALVIN I. KRENZLER

CASE NUMBER: C86-1262

UNITED STATES OF AMERICA, ex rel., LARRY S. EAGLEYE, et al.,

V.

TRW, INC.,

DEPOSITION SUBPOENA

TYPE OF CASE: *CIVIL*

SUBPOENA FOR: *DOCUMENT(S) or OBJECT(S)*

TO: *Christian H. Stickan, Esq.,*
Assistant United States Attorney
1404 East 9th Street - Suite 500
Cleveland, Ohio 44114

YOU ARE HEREBY COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE: *Meyers, Hentemann, Schneider & Rea*
2121 Superior Building
815 Superior Avenue N.E.
Cleveland, Ohio 44114

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DATE AND TIME: *Tuesday November 7, 1989 9:00 A.M.*

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

NOTE: *PLEASE SEE ATTACHED DUCES TECUM*

* * *

QUESTIONS MAY BE ADDRESSED TO:

Regional P. Trubey, Esq.,
2121 Superior Building
815 Superior Avenue N.E.
Cleveland, Ohio 44114
Tel: (216) 241-3435

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DUCES TECUM

BRING WITH YOU:

1.) Any and all documents, not supplied by Relator Larry S. Eagleye, relating to tooling and the 820 Account from CCD 1976 through 1985.

2.) Any and all documents, not supplied by Relator Larry S. Eagleye, relating to TRW's metallurgical department at CCD from 1976 through 1985, relating to the inconsistent processing of factory labor which has recently been litigated in administrative hearing pursuant to 31 United States code sections 37 29 et seq.

3.) Any and all documents, not supplied by Relator Larry S. Eagleye, relating to lots 10, 11, and 12 for "the 12 month procurement of F100 compressor blades" from TRW's Danville Plant in Danville Pennsylvania from 1980 through 1984.

4.) Any and all documents, not supplied by Relator Larry S. Eagleye, relating to TRW's price negotiations with General Electric which took place in 1982, for General Electric's 1983 requirements concerning its jet engines, I.E. compressor blades and fan blades.

5.) Any and all documents, not supplied by Relator Larry S. Eagleye, relating to TRW's negotiations with General Electric concerning the pricing of the fan blades to be used in B-1 Bomber for the years 1980 through 1984.

6.) Any and all documents, not supplied by Relator Larry S.

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Eagleye, relating to TRW's negotiations with General Electric concerning CFM56-CASE segments to be used in the KC-135 tanker used by the United States Air Force and Navy.

7.) Any and all documents, not supplied by Relator Larry S. Eagleye, "at CCD group and/or sector levels of TRW" for 1976 through December, 1984 concerning the changing padding and destruction routings used in negotiations of military contracts with Prime contractors of the Department of Defense "General Electric Company and Pratt Whitney."

8.) Any and all documents, not supplied by Relator Larry S. Eagleye, " at CCD group and/or sector levels of TRW" from 1976 through 1984 concerning FR cost, product line reporting, R. F. P. A. pricing and commodities P&L's.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO - EASTERN DIVISION

JUDGE ALVIN I. KRENZLER

CASE NUMBER: C86-1262

UNITED STATES OF AMERICA, ex rel., LARRY S. EAGLEYE, et al.,

V.

TRW, INC.,

DEPOSITION SUBPOENA

TYPE OF CASE: *CIVIL*

SUBPOENA FOR: *DOCUMENT(S) or OBJECT(S)*

TO: *Jim Thomas*
Defense Criminal Investigative Services
1240 East 9th Street
Cleveland, Ohio 44199-0509

YOU ARE HEREBY COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE: *Meyers, Hentemann, Schneider & Rea*
2121 Superior Building
815 Superior Avenue N.E.
Cleveland, Ohio 44114

Appendix L

DATE AND TIME: *Wednesday November 8, 1989 9:00 A.M.*

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

NOTE: *PLEASE SEE ATTACHED DUCES TECUM*

* * *

QUESTIONS MAY BE ADDRESSED TO:

Regional P. Trubey, Esq.,
2121 Superior Building
815 Superior Avenue N.E.
Cleveland, Ohio 44114
Tel: (216) 241-3435

Appendix L

DUCES TECUM

BRING WITH YOU:

1.) Any and all documents, not supplied by Relator Larry S Eagleye, relating to tooling and the 820 Account from CCD 1976 through 1985.

2.) Any and all documents, not supplied by Relator Larry S. Eagleye, relating to TRW's metallurgical department at CCD from 1976 through 1985, relating to the inconsistent processing of factory labor which has recently been litigated in administrative hearing pursuant to 31 United States code sections 37 29 et seq.

3.) Any and all documents, not supplied by Relator Larry S. Eagleye, relating to lots 10, 11, and 12 for "the 12 month procurement of F100 compressor blades" from TRW's Danville Plant in Danville Pennsylvania from 1980 through 1984.

4.) Any and all documents, not supplied by Relator Larry S. Eagleye, relating to TRW's price negotiations with General Electric which took place in 1982, for General Electric's 1983 requirements concerning its jet engines, I.E. compressor blades and fan blades.

5.) Any and all documents, not supplied by Relator Larry S. Eagleye, relating to TRW's negotiations with General Electric concerning the pricing of the fan blades to be used in B-1 Bomber for the years 1980 through 1984.

6.) Any and all documents, not supplied by Relator Larry S.

Appendix L

Eagleye, relating to TRW's negotiations with General Electric concerning CFM56-CASE segments to be used in the KC-135 tanker used by the United States Air Force and Navy.

7.) Any and all documents, not supplied by Relator Larry S. Eagleye, "at CCD group and/or sector levels of TRW" for 1976 through December, 1984 concerning the changing padding and destruction routings used in negotiations of military contracts with Prime contractors of the Department of Defense "General Electric Company and Pratt Whitney."

8.) Any and all documents, not supplied by Relator Larry S. Eagleye, "at CCD group and/or sector levels of TRW" from 1976 through 1984 concerning FR cost, product line reporting, R. F. P. A. pricing and commodities P&L's.

Appendix L

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO - EASTERN DIVISION

JUDGE ALVIN I. KRENZLER

CASE NUMBER: C86-1262

UNITED STATES OF AMERICA, ex rel., LARRY S. EAGLEYE, et al.,

V.

TRW, INC.,

DEPOSITION SUBPOENA

TYPE OF CASE: *CIVIL*

SUBPOENA FOR: *DOCUMENT(S) or OBJECT(S)*

TO: *Joel Greenberg*
Defense Logistics Agency
Defense Contract Administers
1240 East 9th Street
Cleveland, Ohio 44114

YOU ARE HEREBY COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE: *Meyers, Hentemann, Schneider & Rea*
2121 Superior Building
815 Superior Avenue N.E.
Cleveland, Ohio 44114

Appendix L

DATE AND TIME: *Thursday November 9, 1989 9:00 A.M.*

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

NOTE: *PLEASE SEE ATTACHED DUCES TECUM*

* * *

QUESTIONS MAY BE ADDRESSED TO:

Regional P. Trubey, Esq.,
2121 Superior Building
815 Superior Avenue N.E.
Cleveland, Ohio 44114
Tel: (216) 241-3435

Appendix L

DUCES TECUM

BRING WITH YOU:

1.) Any and all documents, not supplied by Relator Larry S Eagleye, relating to tooling and the 820 Account from CCD 1976 through 1985.

2.) Any and all documents, not supplied by Relator Larry S. Eagleye, relating to TRW's metallurgical department at CCD from 1976 through 1985, relating to the inconsistent processing of factory labor which has recently been litigated in administrative hearing pursuant to 31 United States code sections 37 29 et seq.

3.) Any and all documents, not supplied by Relator Larry S. Eagleye, relating to lots 10, 11, and 12 for "the 12 month procurement of F100 compressor blades" from TRW's Danville Plant in Danville Pennsylvania from 1980 through 1984.

4.) Any and all documents, not supplied by Relator Larry S. Eagleye, relating to TRW's price negotiations with General Electric which took place in 1982, for General Electric's 1983 requirements concerning its jet engines, I.E. compressor blades and fan blades.

5.) Any and all documents, not supplied by Relator Larry S. Eagleye, relating to TRW's negotiations with General Electric concerning the pricing of the fan blades to be used in B-1 Bomber for the years 1980 through 1984.

6.) Any and all documents, not supplied by Relator Larry S.

Appendix L

Eagleye, relating to TRW's negotiations with General Electric concerning CFM56-CASE segments to be used in the KC-135 tanker used by the United States Air Force and Navy.

7.) Any and all documents, not supplied by Relator Larry S. Eagleye, "at CCD group and/or sector levels of TRW" for 1976 through December, 1984 concerning the changing padding and destruction routings used in negotiations of military contracts with Prime contractors of the Department of Defense "General Electric Company and Pratt Whitney."

8.) Any and all documents, not supplied by Relator Larry S. Eagleye, "at CCD group and/or sector levels of TRW" from 1976 through 1984 concerning FR cost, product line reporting, R. F. P. A. pricing and commodities P&L's.

Appendix L

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO - EASTERN DIVISION

JUDGE ALVIN I. KRENZLER

CASE NUMBER: C86-1262

UNITED STATES OF AMERICA, ex rel., LARRY S. EAGLEYE, et al.,

V.

TRW, INC.,

DEPOSITION SUBPOENA

TYPE OF CASE: *CIVIL*

SUBPOENA FOR: *DOCUMENT(S) or OBJECT(S)*

TO: *Joyce R. Branda, Esq.*
c/o Marcia Johnson, Esq.,
Assistant United States Attorney
Chief of Civil Division of the U.S. Attorney
office for the Northern District of Ohio
1404 East 9th Street - Suite 500
Cleveland, Ohio 44114

YOU ARE HEREBY COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

Appendix L

PLACE: *Meyers, Hentemann, Schneider & Rea*
2121 Superior Building
815 Superior Avenue N.E.
Cleveland, Ohio 44114

DATE AND TIME: *Friday November 10, 1989 9:00 A.M.*

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

NOTE: *PLEASE SEE ATTACHED DUCES TECUM*

* * *

QUESTIONS MAY BE ADDRESSED TO:
Regional P. Trubey, Esq.,
2121 Superior Building
815 Superior Avenue N.E.
Cleveland, Ohio 44114
Tel: (216) 241-3435

Appendix L

DUCES TECUM

BRING WITH YOU:

Any and all January 7, 1987 memoranda to all fraud attorneys from Michael F. Hertz, director of commercial litigation branch Civil Division of the department of Justice; and your files relating to United States of America, ex rel., Larry S. Eagleye., et al., v. TRW Inc.

Appendix L

PURPOSE OF DEPOSITIONS AND PRODUCTION OF DOCUMENTS

The government has alleged in its Motion to Dismiss the Relators that it knew about the fraudulent overpricing at TRW at the time that Relator Eagleye and the other relators filed the Qui Tam lawsuit against TRW in April of 1986.

The purpose of these depositions and production of documents is to show that the government DID NOT KNOW OR KNEW VERY LITTLE ABOUT ANY OR ALL OF THE METHODS, SCHEMES, OPERATING PROCEDURES AND INSTANCES OF FRAUDULENT OVERPRICING AT TRW AT THE TIME THE RELATORS FILED THEIR QUI TAM SUIT IN APRIL OF 1986.

Appendix L

EXHIBIT B

1,125 pages of sworn testimony of Relator Eagleye given to the United Department of Justice Department.

FILED UNDER SEAL BY MANDATE OF THE DEPARTMENT OF JUSTICE

Appendix L

EXHIBIT C

FAY, SHARPE, BEALL, FAGAN, MINNICH & McKEE
ATTORNEYS AT LAW
400 NATIONAL CITY EAST SIXTH BUILDING
CLEVELAND, OHIO 44114-2214
(216) 861-5582

June 24, 1988

Hon. George W. White
United States District Court
Northern District of Ohio
135 U. S. Courthouse
Cleveland, Ohio 44114

Re: United States v. Larry Eagleye

Dear Judge White:

It is my understanding that Larry Eagleye has been found guilty after a plea in the subject case. As the Court may be aware, Mr. Eagleye is a Relator in a pending False Claims Act case brought against TRW, which arises out of the same circumstances that underlie Mr. Eagleye's conviction. At the time the case was brought, I was Chief of the Civil Division in the U. S. Attorney's Office and head of the staff that investigated the charges brought by the Relators. The result of this investigation was a staff recommendation that the government assume prosecution of the case. It is my experience with Mr. Eagleye during this investigation that prompts me to write the Court.

Because of the short deadlines then applicable to the

government's determination to assume the prosecution of a False Claims Act case brought by "whistle blowers", it became necessary for the government to perform an intensive investigation of a wide variety of factual allegations in a very short time period. During this investigation, Mr. Eagleye spent many hours during the evenings and on weekends submitting to intense government interrogation. At all times, he fully cooperated with the government investigators, was extremely patient in explaining complex accounting procedures to relative neophytes, and, I felt, completely candid with respect not only to the overall scheme he was outlining, but his own role in it as well. During this time, Mr. Eagleye never inquired about immunity from prosecution, never attempted to downplay his own role, and uniformly attempted to answer difficult questions without seeking to hide anything.

Mr. Eagleye was of enormous benefit to the government in its investigation. Indeed, it is not overstating the point to conclude that without Mr. Eagleye's cooperation, the government's efforts in the civil False Claims Act case would have been severely hindered.

I thank you for this opportunity to be heard, and I hope that my comments are of some help to you in formulating your sentencing decision.

Very truly yours,

Alan J. Ross

AJR:jd

cc: Christian H. Sticken, Esq.
Assistant United States Attorney

Reginald P. Trubey, Jr., Esq.

Appendix L

EXHIBIT D

U.S. HOUSE OF REPRESENTATIVES
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, DC 20515

May 23, 1988

The Honorable George White
District Judge
Northern District of Ohio
Federal Court House
201 Superior Avenue
Cleveland, Ohio 44114

Dear Judge White:

The Subcommittee on Oversight and Investigations has been investigating the adequacy of self-policing by defense contractors. In the course of that investigation, Mr. Larry Eagleye, a former TRW comptroller, testified before the Subcommittee on March 4, 1987. A copy of that hearing record is enclosed.

Mr. Eagleye cooperated fully with the Subcommittee staff prior to the hearing. He then testified before the Subcommittee openly and honestly under oath and without a subpoena. He answered all questions put to him, including providing self-incriminating evidence. In fact, I now understand he has pled guilty to a felony arising out of conduct which he described in his sworn testimony before the Subcommittee.

Appendix L

Mr. Eagleye's testimony was extraordinarily helpful in understanding a complex, but important, issue. He spent many hours with the Subcommittee staff explaining documents and describing documents. He saved us a considerable amount of time and effort. I would, therefore, suggest that you consider Mr. Eagleye's full cooperation with the Subcommittee in a favorable light in your upcoming sentencing decision.

Thank you for your cooperation in this matter.

Sincerely,
s/ John D. Dingell
John D. Dingell
Chairman
Subcommittee on
Oversight and Investigations

Enclosure

APPENDIX M — MEMORANDUM OF OPINION AND ORDER OVERRULING RELATORS' MOTIONS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION FILED JUNE 28, 1989

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JUDGE ALVIN I. KRENZLER

CASE NO. C86-1262

UNITED STATES OF AMERICA ex. rel. EAGLEYE, et al.,

Plaintiffs

-vs-

TRW INC.

Defendant

MEMORANDUM OF OPINION AND ORDER OVERRULING RELATORS' MOTIONS

On April 4, 1986, the relators, Larry S. Eagleye, Charles W. Broome, and Alan J. Russ, filed the above-captioned *qui tam* action on behalf of the plaintiff, United States of America, against various defendants including TRW Inc.

On June 3, 1986, the United States filed its notice of appearance as the plaintiff in this action, pursuant to 31 U.S.C. § 3730(b)(3) (1983 ed.) (subsequently amended by the False

Claims Amendments Act of 1986, 31 U.S.C. § 3730(b)(4)). On July 31, 1986, the United States filed its first amended complaint naming TRW Inc. as the sole defendant. On July 31, 1986, the parties entered into a stipulation approved by the Court which provided that further proceedings would be stayed pending completion of the government's criminal investigation or untll further order of this Court.

The relators have filed a motion to unseal certain documents and for an order to show cause why TRW should not be held in contempt of this Court's protective order. In addition, relators have moved that this Court issue an order that the 1986 amendments to the False Claims Amendments Act of 1986 should be applied to this case, including a determination of their status as relators. Both TRW and the United States Government argue that the False Claims Amendments Act of 1986 should not be applied to this case.

FALSE CLAIMS AMENDMENTS ACT OF 1986

The False Claims Amendments Act became effective on October 27, 1986. The Congress of the United States decided to broaden the provisions of the False Claims Act by doing several things including, but not limited to, the following.

(1) *Increased Damages.* Damages were increased from double to triple.

(2) *Knowledge.* The standard of intent for a finding of liability was changed to those who know, or have reason to know, that a claim is false. The standard for liability is for those who have actual knowledge that a claim is false, fictitious or fraudulent or acts in gross negligence of the duty to make such inquiry as would be reasonable and prudent under the circumstances.

(3) *Burden of Proof.* The burden of proof was changed to a preponderance of the evidence.

(4) *Qui Tam Provisions.* The 1986 Amendments increased the rights of private citizens to bring and maintain suits on behalf of the United States. The 1986 Amendments also gave a relator an increased share of any recovery, a right to reasonable attorneys fees, expenses and costs, and increased rights to participate in the suit, even if the United States takes over the litigation.

There is good reason for a *qui tam* plaintiff to want the 1986 Amendments to apply, rather than previous law. If the 1986 Amendments apply, the relator is entitled to an increased share of the proceeds over previous law. The right of the relators to participate in the lawsuit was also provided for, in the 1986 Amendments, as the Congress of the United States believed that it was better for the government to have the relators continue in a litigation and assist the government, under theory of two heads are better than one.

The United States Government and TRW opposed the application of the 1986 Amendments. Under prior law, if the government intervenes and takes over the suit within a 60-day period, the action is controlled solely by the government. The person who brought the action has virtually no guaranteed involvement or access to information about the false claims suit. The 1986 *qui tam* provisions provide the relators with a more direct role, not only in keeping abreast of the government's efforts and protecting his financial state, but also acting as a check that the government does not neglect evidence, cause undue delay, or drop a false claims case without a legitimate reason. Specifically, whenever the government takes over a privately initiated action, the individual who brought the suit will be served, upon request,

with copies of all pleadings filed, as well as deposition transcript. Additionally, the person who brought the action may formally object to any motions to dismiss or proposed settlement between the government and the defendant. Also, a *qui tam* plaintiff may reguest that the Court allow him to take over the suit if the government has not proceeded with reasonable diligence within six months of intervening in the action.

The *qui tam* relators' right to a portion of the recovery resulting from a successful false claims suit initiated by the relator has been increased. When the government has intervened, taken over the suit and produced a recovery, the relator will receive between 10 and 20 percent of the recovery. If the relator has litigated the false claims action successfully and the government did not take over the suit, the relator will be awarded between 20 and 30 percent of the judgment or settlement proceeds.

Prior law allows the relator upwards of 10 percent in suits the government takes over and up to 25 percent where the relator litigates without the government. The new provisions create a guarantee that the relators will receive at least some portion of the award if the litigation is successful.

The question that this Court must resolve is whether the *qui tam* provisions in effect at the time the present litigation was filed on April 4, 1986, or the amendments which became effective on October 27, 1986, should govern. It is the view of this Court that the provisions of law applicable at the time the litigation was filed shall prevail. The relators filed the original action which was taken over by the government within the sixty-day period. Obviously, if the Court held that the 1986 Amendments apply, the relators could continue to participate in the case and assist the government. They could also oppose any action the government took that they did not

believe was in the best interests of the United States Government. Further, they would be entitled to increased money if the government prevailed. If the Amendment did not apply, then the government would proceed with the case without the benefit of the *qui tam* relators.

It is the position of this Court that the *qui tam* provisions in effect at the time the litigation was filed prevail and that the 1986 provisions do not apply. Further, because of the ongoing criminal investigation, the Court deems it in the best interests of the government not to unseal the documents until the completion of the criminal investigation.

The motion of the relators to unseal the documents is overruled. The motion to cite TRW in contempt of court is overruled and the motion of the relators to have standing under the False Claims Amendment of 1986 is overruled.

IT IS SO ORDERED.

s/ Alvin I. Krenzler
UNITED STATES DISTRICT JUDGE

Reginald Trubey, Jr.
Leonard Carr
Marcia Johnson
Gerald Palmer

APPENDIX N — COVER PAGES OF TRANSCRIPTS OF PROCEEDINGS DATED APRIL 8, 12, 13, 14, 15, 1986; FEBRUARY 19, 1987; MARCH 12, 1987; MAY 18, 1987; JUNE 9, 1987

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TRANSCRIPT OF PROCEEDING

INTERVIEW IN RE: TRW, INC.

VOLUME I

Interview of LARRY S. EAGLEYE, taken on Tuesday, the 8th day of April, 1986, before me, the undersigned, Joseph S. Corsillo, Registered Professional Reporter, a Notary Public in and for the State of Ohio, at the offices of the United States Attorney, Suite 500 BancOhio Building, 1404 East 9th Street, Cleveland, Ohio 44114, commencing at 6:00 p.m. the day and date above set forth.

Appendix N

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TRANSCRIPT OF PROCEEDING

INTERVIEW IN RE: TRW, INC.

VOLUME III

Interview of LARRY S. EAGLEYE, taken on Saturday, the 12th day of April, 1986, before me, the undersigned, Richard N. Hamski, Registered Professional Reporter, a Notary Public in and for the State of Ohio, at the offices of Meyers, Hentemann, Schneider & Rea, Co., L.P.A. 2121 Superior Building, Cleveland, Ohio 44114, commencing at 8:00 a.m. the day and date above set forth.

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TRANSCRIPT OF PROCEEDING

INTERVIEW IN RE: TRW, INC.

VOLUME IV

Interview of LARRY S. EAGLEYE, taken on Sunday, the 13th day of April, 1986, before me, the undersigned, Gerald Abbadini, Registered Professional Reporter, a Notary Public in and for the State of Ohio, at the offices of Meyers, Hentemann, Schneider & Rea, Co., L.P.A., 2121 Superior Building, Cleveland, Ohio 44114, commencing at 9:20 a.m. the day and date above set forth.

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TRANSCRIPT OF PROCEEDING

INTERVIEW IN RE: TRW, INC.

VOLUME V

Interview of LARRY S. EAGLEYE, taken on Monday, the 14th day of April, 1986, before me, the undersigned, Gerald Abbadini, Registered Professional Reporter, a Notary Public in and for the State of Ohio, at the offices of Meyers, Hentemann, Schneider & Rea, Co., L.P.A., 2121 Superior Building, Cleveland, Ohio 44114, commencing at 5:55 p.m. the day and date above set forth.

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TRANSCRIPT OF PROCEEDING

INTERVIEW IN RE: TRW, INC.

VOLUME VI

Interview of LARRY S. EAGLEYE, taken on Tuesday, the 15th day of April, 1986, before me, the undersigned, Kathleen Tomallo, Registered Professional Reporter, a Notary Public in and for the State of Ohio, at the offices of Meyers, Hentemann, Schneider & Rea, Co., L.P.A., 2121 Superior Building, Cleveland, Ohio 44114, commencing at 6:30 p.m. the day and date above set forth.

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TRANSCRIPT OF PROCEEDING

INTERVIEW IN RE: TRW, INC.

VOLUME VII

Interview of LARRY S. EAGLEYE, taken on Saturday, the 19th day of April, 1986, before me, the undersigned, Denise D. Bouquet, Registered Professional Reporter, a Notary Public in and for the State of Ohio, at the offices of Meyers, Hentemann, Schneider & Rea, Co., L.P.A., 2121 Superior Building, Cleveland, Ohio 44114, commencing at 9:00 a.m. the day and date above set

forth.

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TRANSCRIPT OF PROCEEDING

INTERVIEW IN RE: TRW, INC.

VOLUME VIII

Interview of LARRY S. EAGLEYE, taken on Saturday, the 19th day of April, 1986, before me, the undersigned, Denise D. Bouquet, Registered Professional Reporter, a Notary Public in and for the State of Ohio, at the offices of Meyers, Hentemann, Schneider & Rea, Co., L.P.A., 2121 Superior Building, Cleveland, Ohio 44114, commencing at 9:00 a.m. the day and date above set forth.

Appendix N

TRANSCRIPT OF PROCEEDING

INTERVIEW IN RE: TRW, INC.

VOLUME IX

Interview of LARRY S. EAGLEYE, taken on Thursday, the 19th day of February, 1987, before me, the undersigned, Mary Jean Zbiegien, Registered Professional Reporter, a Notary Public in and for the State of Ohio, at the offices of Meyers, Hentemann, Schneider & Rea, Co., L.P.A., 2121 Superior Building, Cleveland, Ohio 44114, commencing at 6:00 p.m. the day and date above set forth.

Appendix N

TRANSCRIPT OF PROCEEDING

INTERVIEW IN RE: TRW, INC.

VOLUME X

Interview of LARRY S. EAGLEYE, taken on Thursday, the 12th day of March, 1987, before me, the undersigned, Gerald Abbadini, Registered Professional Reporter, a Notary Public in and for the State of Ohio, at the offices of Meyers, Hentemann, Schneider & Rea, Co., L.P.A., 2121 Superior Building, Cleveland, Ohio 44114, commencing at 6:15 p.m. the day and date above set forth.

Appendix N

TRANSCRIPT OF PROCEEDING

INTERVIEW IN RE: TRW, INC.

INTERVIEW OF LARRY EAGLEYE
Monday, May 18, 1987

Interview of LARRY S. EAGLEYE, taken on Monday, the 18th day of May, 1987, before me, the undersigned, Marie T. Dillon, Registered Professional Reporter, a Notary Public in and for the State of Ohio, at the offices of Meyers, Hentemann, Schneider & Rea, Co., L.P.A., 2121 Superior Building, 815 Superior Avenue, N.E., Cleveland, Ohio 44114, commencing at 4:00 p.m. the day and date above set forth.

Appendix N

TRANSCRIPT OF PROCEEDING

INTERVIEW IN RE: TRW, INC.

INTERVIEW OF LARRY EAGLEYE
Tuesday, June 9, 1987

Interview of LARRY S. EAGLEYE, taken on Tuesday, the 9th day of June, 1987, before me, the undersigned, Kathleen M. Mowrer, Registered Professional Reporter, a Notary Public in and for the State of Ohio, at the offices of Meyers, Hentemann, Schneider & Rea, Co., L.P.A., 2121 Superior Building, Cleveland, Ohio 44114, commencing at 3:00 p.m. the day and date above set forth.

Supreme Court, U.S.
FILED
FEB 18 1994
OFFICE OF THE CLERK

No. 93-1204

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LARRY S. EAGLEYE,

Petitioner,

v.

TRW INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO THE PETITION

Of Counsel

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Counsel for Respondent TRW Inc.

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United States v. Hill, 676 F. Supp. 1158 (N.D. Fla. 1987) 8

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1204

LARRY S. EAGLEYE,

Petitioner,

v.

TRW INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION TO THE PETITION

STATEMENT

In 1984, as soon as a potential government contracting problem at the Compressor Components Division of TRW's Aircraft Components Group was suggested to the management of TRW Inc. ("TRW"),[1] TRW launched a comprehensive internal investigation, led by the TRW Law Department and supported by

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[1] Pursuant to Rule 29.1, the Court is advised that TRW Inc. owns less than 100% interest in forty-five entities, of which only five are publicly held. Those five are as follows: Moresa, S.A. de C.V.; Representaciones C.V.D., S.A.; Sybase, Inc.; TRW do Brasil, S.A.; and United Insurance Company.

outside counsel, internal and external auditors, and financial, engineering and other personnel.

In November 1984, TRW voluntarily disclosed the initial results of its ongoing investigation to officials of the Department of Defense, the Department of Justice, the Defense Contract Audit Agency, and the Defense Logistics Agency. In February 1985, TRW presented to the government a follow-up report and continued to work with government personnel investigating the matter. The government began its own investigation and, as part of that activity, interviewed Petitioner Eagleye and other individuals. TRW ceased the practices involved, fired the perpetrators, including Petitioner Eagleye, and adopted a series of remedial measures.

Thus, long before Petitioner Eagleye ever filed his bounty-hunter lawsuits, TRW's responsibilities were being fulfilled by (1) TRW's own internal investigation; (2) TRW's prompt and voluntary disclosure of the results of that investigation; (3) TRW's voluntary adoption of remedial and disciplinary steps; and (4) TRW's expression of its willingness to make appropriate restitution and to cooperate fully with the government. Additionally, several government agencies had already begun civil and criminal investigations. All these events were old news by April 4, 1986, when the first *qui tam* complaint was filed by Petitioner Eagleye.[2] The case has become identified in these judicial proceedings as *Eagleye I*.

When the April 4 Complaint was filed, the False Claims Act flatly prohibited the maintenance of any *qui tam* suit based on evidence or information that the government possessed when the action was brought. 31 U.S.C. § 3730(b)(4) (1982). After conducting its review of the Complaint as required by the False Claims Act, in the context of its ongoing investigation then a year and one-half old, the government elected on June 3, 1986, to

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[2] The two other relators filing the *qui tam* complaint, Russ and Broome, have not joined in Eagleye's petition to this Court.

notice its appearance and to take control of this action as plaintiff. Thereafter, it filed the First Amended Complaint, which made clear that the government was proceeding on the basis of the matters previously disclosed by TRW and investigated by the government.

Shortly after the government filed its notice of appearance, TRW filed a motion to dismiss claims and causes of action that were in relators' original Complaint but not in the government's First Amended Complaint. The purpose of the motion was simple: to clarify that, once the government took over the case, relators lacked any right to proceed on their Complaint, even though the government's First Amended Complaint had, after investigation, dropped most of the specific charges in the relators' Complaint. Instead of resisting TRW's motion, Eagleye, Broome and Russ expressly acknowledged -- consistent with the governing False Claims Act -- that they had no right to continue to proceed against TRW, in a stipulation signed by the parties and the would-be relators (no longer denominated as parties), and entered by the District Court as an Order. (R: 48; Stipulation and Order filed July 31, 1986.) Specifically, paragraph 4 of that Stipulation and Order states:

> "The original complaint shall not be the basis for any further proceedings by relators in this action or for any separate action brought or pursued by relators." (*Id.* at ¶ 4) (*see* Pet. App. 11a).

Also on July 31, 1986, the District Court stayed the matter until a concurrent criminal investigation could be concluded. (R: 46.) During the stay, TRW (consistent with its policy of accepting responsibility) began payments on its multi-million-dollar commitment to restitution and pleaded guilty to three counts of conspiracy to defraud -- counts relating to conduct that TRW itself had fully disclosed four years before the government's investigation was completed, and well over a year before relators filed their Complaint. After the stay was lifted in February 1989, the District Court granted the government's motion to dismiss from *Eagleye I* all three would-be relators. (Pet. App. 40a-51a).

Petitioner filed another Complaint under seal on August 12, 1987, subsequent to the 1986 amendments to the False Claims Act. *United States ex rel. Eagleye v. TRW Inc., et al.*, Case No. C87-2088 (N.D. Ohio, Aug. 12, 1987) ("*Eagleye II*"). Even before the Complaint in *Eagleye II* was unsealed, the government moved to dismiss on the grounds that the Complaint did not set forth any allegations not already addressed in *Eagleye I* and that, under the *qui tam* provisions of the False Claims Act in place at the time of the violation, relators could not maintain *Eagleye II*. The District Court dismissed *Eagleye II* on November 30, 1990. (Pet. App. 32a-36a). The District Court certified its ruling in *Eagleye I* as a Final Judgment pursuant to Rule 54(b), Federal Rules of Civil Procedure.

The three putative relators appealed both cases to the Sixth Circuit Court of Appeals, which, on August 23, 1993, affirmed. The Court of Appeals considered two issues: first, whether the District Court correctly ruled that the 1986[3] and 1988[4] amendments to the False Claims Act did not apply retroactively to relators' *qui tam* action based on conduct occurring and ceasing before adoption of the amendments; and, second, whether the District Court correctly determined that the relators were not entitled to any bounty-hunter recovery under the 1982 provisions of the False Claims Act. (Pet. App. 7a-8a).

The Court of Appeals resolved the first issue by concluding that the 1986 and 1988 amendments could not be applied retroactively to conduct occurring before their adoption. The Court considered but rejected relators' reliance on *Bradley v. Richmond School Board*, 416 U.S. 696 (1974). The Court of Appeals was guided by this Court's more recent analysis in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988), that "[r]etroactivity is not favored in the law" and "congressional enactments and administrative rules will not be

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[3] Pub. L. No. 99-562, 100 Stat. 3154 (1986).

[4] Pub. L. No. 100-700, 102 Stat. 4638 (1988).

construed to have retroactive effect unless their language requires this result." The Court of Appeals then concluded, consistent with its previous decisions in *Boddie v. American Broadcasting Co.*, 881 F.2d 267 (6th Cir. 1989), *cert. denied*, 493 U.S. 1028 (1990), and *United States v. Murphy*, 937 F.2d 1032 (6th Cir. 1991), that *Bradley* represented a narrow exception to the general principle that statutes operate only prospectively, a notion "familiar to every law student." *Boddie*, 881 F.2d at 269-70 (citation omitted). The Court of Appeals determined that there was no clear language evidencing an intent for retroactive application and that the amendments involved "substantive rights." It concluded finally that the amendments did not come within *Bradley*'s narrow exception, that they were not applicable in this case, and that the False Claims Act as it read in 1982 applied. (Pet. App. 17a-18a).

As to the second issue, the Court of Appeals determined that, under the False Claims Act as it existed in 1982, the District Court properly dismissed the relators in *Eagleye I* and the action in *Eagleye II*. In reaching that decision, the Court rejected the government's jurisdictional argument that the relators should have been dismissed because their claims were based on information possessed by the government at the time the action was filed, under Sections 3730(b)(4) and (c)(1). Instead, the Court was satisfied that the District Court had not based its decision on the jurisdictional ground cited by the government but had applied a summary judgment standard to determine that relators were not entitled to a reasonable informer's fee under Section 3730(c)(1). The Court determined, under that standard, that relators had failed to present any evidence to refute the government's evidence establishing that it was aware of the challenged conduct, based on two reports voluntarily disclosed by TRW in November 1984 and February 1985, before the relators filed their *qui tam* actions. It concluded therefore that the District Court was correct as a matter of law in determining relators to be ineligible to receive an informer's fee. (Pet. App. 21a-23a).

ARGUMENT

The Petition raises no significant issues of law and no conflict among the circuits warranting this Court's review. The petition presents matters that, *inter alia*, (1) are predicated upon misconceptions as to the *factual* bases of the Court of Appeals' decision; (2) misconstrue the *legal* bases for that decision; (3) involve agreement, not disagreement, between the Circuits; and (4) can have no impact on Petitioner's ultimate claims and could potentially affect only a very narrow range of other possible cases. For these reasons, the petition for writ of certiorari does not present matters appropriate for invocation of this Court's discretionary jurisdiction and the writ should be denied.

The setting and posture of this case make it an unsatisfactory candidate for review even if relator Eagleye had raised any significant points of law of general applicability. Extricating justice from the mire of relators' misconduct and muddy procedures, both the District Court and the Court of Appeals determined that relators had not demonstrated any legitimate basis for sharing in any proceeds that the government may receive as a result of the problems caused by relators and voluntarily disclosed to the government by defendant TRW. Equity alone supports the decisions below: relator Eagleye should not receive a windfall recovery resulting from his own illegal conduct unless that result is absolutely compelled by the law, which it is not.

A. Petitioner's First Question Was Not Passed Upon By The Court Of Appeals.

Petitioner Eagleye's first question presents an evidentiary question of no constitutional significance: whether the District Court erred when it allegedly considered and relied upon a sealed affidavit of an assistant U.S. attorney in the proceedings leading to dismissal of the relators' claims for an informant's bounty. In short, even though the Court of Appeals did not even consider the affidavit, Petitioner Eagleye seems to contend that this Court should review a District Court determination to allow an affidavit submitted by one party to become part of the record.

While petitioner contends that the affidavit in question should not have been admitted because he had no right to contest its veracity, he fails to show how the District Court's procedure raises any question of general import, much less constitutional significance. He also fails to show how, if the District Court had ruled differently and not accepted the affidavit as part of the record, the decision of the Court of Appeals would have been different. That latter showing cannot, of course, be made. The Court of Appeals did not consider the Stickan affidavit in reviewing *de novo* the District Court's summary judgment dismissing the relators. Rather, reviewing the evidence most favorably to the relators, the Court of Appeals determined that the government had presented sufficient evidence -- without regard to the challenged affidavit -- to support the government's contention that it had knowledge of the challenged conduct prior to relators' *qui tam* complaint. (Pet. App. 22a). The Court of Appeals also concluded that the relators, including Petitioner Eagleye, had failed to present any evidence to raise any genuine issue of material fact to support their claim to a bounty. (*Id.*)

There is no basis at all for this Court to review that sound judgment. *See, e.g., J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981) ("We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed. . ."). Moreover, even if this Court were to accept Petitioner's first, case specific, procedural question, no difference in outcome could result from full review because the challenged affidavit was not part of the evidence relied upon by the Sixth Circuit to review *de novo* and to affirm the propriety of the District Court's summary judgment.

B. Petitioner's Second Question Was Decided By The Court Of Appeals In Petitioner's Favor.

The second question presented by Petitioner leaves nothing for review by this Court. Petitioner Eagleye questions whether the "jurisdictional bar" of 31 U.S.C. § 3730(b)(4) (1982) was appropriate for the District Court to apply in determining whether a relator is entitled to an informant's fee in a case in which the

government takes over the prosecution. However, neither the District Court nor the Court of Appeals based its decision on that section, which applies only when the government declines to take over the case. Indeed, the Court of Appeals expressly rejected the government's argument contending that the section should be applied. (Pet. App. 20a). Thus, a decision in Petitioner's favor on this issue will not change the result reached by the Court of Appeals; there is nothing for this Court to review.

C. Petitioner's Third Question Involves No Conflict Among The Circuits.

The final issue raised by petitioner Eagleye is whether the 1986 (and 1988) amendments to the False Claims Act can be applied to conduct that occurred prior to their enactment. Petitioner is obviously eager to have the amendments applied -- among other things, they increased the statutory penalties, increased the potential multiple against actual damages from double to treble, and increased the percentage sharing available to certain relators. In addition, they allow bounty participation to a relator based on contribution to the prosecution rather than on timing of disclosure, the standard applicable when Petitioner made his disclosures. However, again Petitioner has shown no reason why that issue should be reviewed by this Court in this particular case.

The Sixth Circuit Court of Appeals is the first appellate court to decide whether the 1986 amendments to the False Claims Act affected substantive rights and liabilities, so that they could not be applied to conduct that occurred prior to the amendments' adoption. In *United States v. Murphy*, 937 F.2d at 1038, the Court held that they did affect substantive rights and liabilities and could not be retroactively applied. While decisions of various district courts are in conflict over the retroactivity issue,[5] the only other appellate court to have addressed the issue to date is the Court of Appeals for the First Circuit. That court -- like the

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[5] *Compare, e.g., United States v. Hill*, 676 F. Supp. 1158 (N.D. Fla. 1987), *with United States v. Bekhrad*, 672 F. Supp. 1529 (S.D. Iowa 1987).

Sixth Circuit -- also concluded that the 1986 amendments may not be retroactively applied to conduct occurring before their adoption. *United States v. Data Translation, Inc.*, 984 F.2d 1256, 1266 (1st Cir. 1992).

Thus, there is no conflict among the circuits with respect to the retroactivity question that needs to be resolved by a decision of this Court, particularly on the muddied record presented in this case. Moreover, the decision of the Sixth Circuit Court of Appeals to deny retroactive application was consistent with the many decisions of this Court decided subsequent to the decision in *Bradley v. Richmond Board of Education*, 416 U.S. 696, the sole decision on which petitioner Eagleye relies. *E.g.*, *Bowen v. Georgetown University Hospital*, 488 U.S. at 208.

Once again, moreover, any decision by this Court, even if this issue were accepted for review, would not change the end result. If the Court determined that the 1986 amendments were not to be retroactively applied to conduct occurring before their adoption, the decision below would be affirmed. On the other hand, if this Court were to decide that the amendments are retroactive, that principle would also make applicable the 1988 amendments that bar recovery to Eagleye because of his criminal involvement and guilty plea. *United States v. Eagleye*, Crim. Action No. CR88-117 (N.D. Ohio, July 28, 1988). Moreover, Petitioner Eagleye fails to mention in his petition a stipulation entered into in 1986, prior to the amendments, which precludes the relators from litigating the issues in any case other than the government's proceeding in *Eagleye I*. Because of that stipulation, relator Eagleye is barred from prosecuting *Eagleye II* as well as *Eagleye I*. (*See* Pet. App. 11a).

CONCLUSION

For the reasons stated above, TRW respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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February 18, 1994

No. 93-1204

In the Supreme Court of the United States

OCTOBER TERM, 1993

LARRY S. EAGLEYE, PETITIONER

v.

TRW, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court improperly relied on sealed materials submitted to it in finding that petitioner's first *qui tam* lawsuit had to be dismissed under the applicable statutory provisions because his complaint was based on information already in the government's possession at the time the suit was filed.

2. Whether the fact that the government already had the information on which this *qui tam* action was based at the time petitioner commenced this action is sufficient to establish that petitioner is not entitled to an informer's fee for bringing the action, under a now-superseded version of the *qui tam* provisions of the False Claims Act.

3. Whether the 1986 amendments to the *qui tam* provisions of the False Claims Act apply retroactively to lawsuits based on conduct that occurred prior to 1986.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1204

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 6a-26a) is reported at 4 F.3d 417. The decisions of the district court (Pet. App. 32a-36a, 40a-51a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1993. A petition for rehearing was denied on September 21, 1993. Pet. App. 2a-3a. On December 10, 1993, Justice Stevens ordered that the time for filing a petition for a writ of certiorari be extended to January 19, 1994. Pet. App. 1a. The petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In November, 1984, and February, 1985, respondent TRW, Inc. provided representatives of the Department of Justice and the Department of Defense with reports of an internal investigation into certain accounting practices of its Compressor Components Division (CCD), which manufactured military jet engine components under subcontracts with several government prime contractors. The reports covered the period 1978-1984. They disclosed numerous irregularities in CCD's standard cost accounting system, which CCD had used to develop labor cost estimates for military subcontract proposals. Among the irregularities were the alteration or "padding" of CCD's standard cost routings, documents that contained step-by-step descriptions of how a part is manufactured and estimates of the amount of time each manufacturing step requires. Pet. App. 8a, 48a.

In December, 1984, the United States Attorney for the Northern District of Ohio opened a criminal investigation into TRW's disclosures. The investigation concluded in August, 1988, after TRW and five former CCD employees, including petitioner Eagleye, pleaded guilty to various criminal charges. Petitioner pleaded guilty to a one-count information charging him with conspiracy to defraud the United States, in violation of 18 U.S.C. 371. TRW pleaded guilty to each of three counts of a criminal information charging it with conspiracy to defraud the United States in violation of 18 U.S.C. 371. All three counts were based on the disclosures made by TRW in November, 1984. Pet. App. 9a.

2. Petitioner and a number of co-relators filed the first of the instant suits (*Eagleye I*), in April, 1986, under the *qui tam* provisions of the False Claims Act, 31 U.S.C. 3730(b) (1982). The suit alleged that TRW and

other defendants had participated in several conspiracies that resulted in the presentation of false claims for payment to the United States. Pursuant to 31 U.S.C. 3730(b)(2) and (3) (1982),[1] the government entered its appearance and assumed control of the litigation. Pet. App. 10a-11a. In an amended complaint, the government named TRW as the sole defendant and realleged only one of the violations of the False Claims Act—that involving CCD's alterations of its standard cost routings—that originally had been pleaded by petitioner. *Id.* at 11a.

In October, 1986, nearly seven months after petitioner filed his complaint in *Eagleye I*, Congress amended the False Claims Act. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (Oct. 27, 1986), now codified at 31 U.S.C. 3729-3733 (1988). Among the amendments were revisions to the *qui tam* provisions of the Act, which expanded the circumstances under which citizens could bring suit on behalf of the government, participate in the litigation, and recover a share of any settlement or judgment. See Pet. App. 10a.

In March, 1989, the government moved to dismiss petitioner and the other relators from the case on three alternative grounds. The government's principal contention was that the relators' standing should be determined under the *qui tam* provisions in effect at the time suit was filed. The government argued that, under 31 U.S.C. 3730(b)(4) and (c)(1) (1982), petitioner lacked

[1] Section 3730(b)(2) provided in pertinent part that "[t]he Government may proceed with [a *qui tam*] action by entering an appearance by the 60th day after being notified [of the filing of the action]." Section 31 U.S.C. 3730(b)(3) (1982) provided:

> If the Government proceeds with the action, the action is conducted only by the Government. The Government is not bound by an act of the person bringing the action.

standing because the allegations in petitioner's complaint that were incorporated by the government in its first amended complaint were based on evidence or information the government already possessed when the action was filed.[2] In support of its contention, the government filed *in camera* and under seal the November, 1984, and February, 1985, reports of TRW's internal investigation, as well as an affidavit from the Assistant United States Attorney who conducted the grand jury's investigation of TRW's disclosures. Pet. App. 47a-48a.

In June, 1989, the district court denied a motion by the relators to have their standing determined under the 1986 amendments to the False Claims Act, holding that "the *qui tam* provisions in effect at the time the litigation was filed prevail and that the 1986 provisions do not apply." Pet. App. 95a. In November, 1990, the district court granted the government's motion to dismiss on the grounds that the allegations in the original complaint that were adopted by the government in its amended complaints were based on evidence and information already in the government's possession at the time the suit was filed. The court accordingly held that 31 U.S.C.

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[2] 31 U.S.C. 3730(b)(4) (1982) provided:

> Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.

31 U.S.C. 3730(c)(1) (1982) provided:

> If the Government proceeds with an action, the person bringing the action may receive an amount the court decides is reasonable for disclosing evidence or information the Government did not have when the action was brought. The amount may not be more than 10 percent of the proceeds of the action or settlement of a claim and shall be paid out of those proceeds.

3730(b)(4) and (c)(1) (1982) barred petitioner and the others from sharing in any monetary recovery that might be obtained in the action. Pet. App. 40a-51a.

3. Meanwhile, in August, 1987, petitioner had filed a second action against TRW and General Electric Company under the 1986 amendments to the False Claims Act (*Eagleye II*). In his complaint, petitioner realleged the claims against TRW and GE that he had earlier alleged in the *Eagleye I* complaint or during his interviews with the government after *Eagleye I* was filed. Pet. App. 23a; Gov't C.A. Br. 16 n.10.

The government entered its appearance in *Eagleye II*, and moved to dismiss petitioner from the action on the grounds that (1) the suit was based on allegations or transactions that were already the subject of *Eagleye I*, in violation of 31 U.S.C. 3730(e)(3) (1988);[3] and (2) the filing of the complaint was in direct violation of a July 31, 1986, stipulation and order that all parties, including petitioner, had signed in *Eagleye I*. In its motion papers, the government also included a notice of dismissal pursuant to Fed. R. Civ. P. 41(a)(1). Pet. App. 23a.

The district court granted the motion to dismiss, although for reasons other than those urged by the government. The court held that the 1986 amendments to the False Claims Act, including amendments to the *qui tam* provisions of the Act, could not be applied in an action involving conduct that occurred before the amendments were enacted. Accordingly, the court considered the government's motion under the provisions of 31 U.S.C. 3730(b)(1) and (3) (1982).[4] The court found that the

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[3] For the text of that provision, see note 6, *infra*.

[4] 31 U.S.C. 3730(b)(3) (1982) provided that "[i]f the Government proceeds with the action, the action is conducted only by the Government. The Government is not bound by any act of the

requirements for dismissal were satisfied and gave its consent to the dismissal. Pet. App. 24a; see *id.* at 32a-36a.

4. The court of appeals affirmed both decisions. Pet. App. 6a-26a. The Sixth Circuit first held that the 1986 amendments to the False Claims Act did not apply to either *Eagleye I* or *Eagleye II* because, in the court's view, the amendments should be applied only to cases based on conduct that occurred after they were enacted. Pet. App. 13a-18a, 25a.

With respect to *Eagleye I*, the court held that although the district court had stated it was granting the government's "motion to dismiss," the order should be construed as a grant of summary judgment against petitioner's claim to recover a fee under 31 U.S.C. 3730(c)(1) (1982) for bringing the action. Pet. App. 19a, 21a. The court observed that the undisputed evidence showed that, before petitioner and the other relators filed their complaint, the government was in possession of sufficient evidence to conduct an adequate investigation of TRW's alleged fraud. *Id.* at 22a. In the court's view, that fact alone precluded award of a fee under 31 U.S.C. 3730(c)(1) (1982). Pet. App. 22a-23a.

The court of appeals also held that the district court had properly dismissed *Eagleye II* under the pre-amendment version of the Act. Pet. App. 23a-25a. Relying on 31 U.S.C. 3730(b)(1) and (3) (1982), the court held that, once the government intervened in a *qui tam* action, it had authority to dismiss the entire case, with the consent of the court. Accordingly, the court held that

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person bringing the action." 31 U.S.C. 3730(b)(1) (1982) provided that "[a]n action may be dismissed only if the court and the Attorney General give written consent and their reasons for consenting."

the district court did not have to hold a hearing or obtain the consent of petitioner and his co-relators before dismissing the action. Pet. App. 25a

ARGUMENT

1. Petitioner claims (Pet. 9-11) that the district court's partial reliance on sealed materials in disposing of *Eagleye I* violated the Due Process Clause. Petitioner did not raise that issue in the court of appeals, and it accordingly is not properly before this Court. *Singleton* v. *Wulff*, 428 U.S. 106, 120-121 (1976); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, the proceedings in this case did not violate the Due Process Clause. Petitioner appears to base his claim (Pet. 10) on the district court's refusal to allow him access to the two TRW reports of its internal investigation (which contained private commercial and financial information of TRW) and to the affidavit of the Assistant United States Attorney (AUSA) who conducted the government's criminal investigation (which contained information subject to the non-disclosure provisions of Rule 6(e), Fed. R. Crim. P.). The government submitted both the TRW reports and the affidavit *in camera* in support of its assertion that, at the time the relators filed their suit, the government already possessed sufficient information and evidence concerning TRW's fraud to bar them from sharing in the government's recovery under 31 U.S.C. 3730(c)(1) (1982) as a matter of law.

Initially, the question whether the district court properly referred to the sealed AUSA's affidavit is no longer of any importance in this case. Applying a *de novo* standard of review, see Pet. App. 19a, the court of appeals relied solely on the TRW reports to establish that the government had sufficient information at the time

petitioner brought this action to require a grant of summary judgment against petitioner. See *id.* at 22a. Accordingly, insofar as the district court may have relied in part on the AUSA's affidavit, that reliance was of no relevance to the decision in this case.

With respect to the use of the TRW reports that were submitted *in camera* to the district court, there was no violation of the Due Process Clause. This Court has frequently held that a district court may, when necessary, adjudicate a variety of issues based on sealed materials. See, *e.g.*, *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292 (1991) (validity of grand jury subpoena); *United States* v. *Zolin*, 491 U.S. 554, 572 (1989) (validity of claim of attorney-client privilege). Thus, the mere fact that the court reviewed the TRW reports *in camera* does not in itself establish a due process violation.

Moreover, in this particular case the district court reasonably drew the balance between the need to protect confidential information and petitioner's need for disclosure. As the facts of this case demonstrate, the public has a strong interest in encouraging government contractors voluntarily to disclose their own wrongdoing to the government, even when doing so involves the disclosure of the contractor's confidential and proprietary information. The district court's action in protecting the confidentiality of the TRW reports clearly served that purpose. On the other hand, the *in camera* procedures here did not completely deprive petitioner of the opportunity to litigate his right to an informer's fee. The issue on which his right to an informer's fee turned was whether the basis for this case was information supplied by petitioner that the government had not already received from TRW's disclosures. Petitioner had ample opportunity to—and did—present evidence concerning the information he supplied to the government; access to

the contents of the TRW reports, which petitioner does not contest were in the hands of the government at the time he filed suit, was unnecessary for that purpose. The only function performed *in camera* was the comparison of petitioner's information with the TRW reports. Adoption of this procedure was reasonable in light of the need to encourage self-reporting of confidential information by companies like TRW.

2. Petitioner argues (Pet. 12-15) that the court of appeals erred in construing the 1982 version of the False Claims Act. He asserts that the court incorrectly held that the 1982 version of the Act precluded an award of an informer's fee to a *qui tam* plaintiff who brought a lawsuit "based on information and evidence in possession of the government at the time the action was filed," even if the government's information was not a "mirror image" of that in the hands of the *qui tam* plaintiff. Pet. App. 22a.

The Sixth Circuit's conclusion that an informer's fee could not be awarded when the government was aware of the basis of the suit is a reasonable interpretation of the language of 31 U.S.C. 3730(c)(1) (1982) and is consistent with the decision of the only other court of appeals that has considered the issue, *United States ex rel. Bayarsky* v. *Brooks*, 210 F.2d 257 (3d Cir. 1954), aff'g 110 F. Supp. 175 (D.N.J. 1953). Moreover, Section 3730(c)(1) (1982) was entirely rewritten when the False Claims Act was amended in 1986; as amended, the statutory standard for awarding an informer's fee in a *qui tam* case is substantially different from the "evidence or information the Government did not have when the action was brought" standard that the court of appeals construed in this case. See 31 U.S.C. 3730(d)(1) (1988). Especially in light of the six-year statute of limitations that applies to all claims under the 1982 Act, see 31 U.S.C. 3731(b) (1982), and to

most claims under the 1986 amendments, see 31 U.S.C. 3731(b)(1) (1988), further review is not warranted to consider whether the court of appeals correctly construed a now-superseded statutory provision.

3. a. Finally, petitioner urges this Court (Pet. 16) to review this case to determine whether the court of appeals properly held that the 1986 amendments to the *qui tam* provisions of the False Claims Act could not be applied in *Eagleye II*, because the conduct at issue occurred prior to the enactment of the amendments.[5] The United States argued in both courts below that the district court should have applied the *qui tam* provisions in effect at the time the suit was filed, and that *Eagleye II*, which was filed in 1987, was properly dismissed under those amended provisions. Nonetheless, further review is not warranted to determine whether the court of appeals correctly determined that the 1986 amendments to the False Claims Act should not be applied retroactively.

The issue on which certiorari is sought concerns the extent to which certain amendments to the False Claims Act passed eight years ago should be applied retroactively to suits based on conduct that occurred prior to that date. There is no conflict in the circuits concerning the retroactive application of the particular provisions at issue in this case, and that question is of little continuing importance. As mentioned above, the 1982 version of the Act contained a 6-year statute of limitations, 31 U.S.C. 3731(b) (1982), and the amended Act has a six-year limitations period applicable to most cases, with an absolute limitations period of ten years. See 31 U.S.C. 3731(b) (1988). Accordingly, there will be few or no additional cases brought based on pre-1986 conduct, and

[5] Petitioner does not challenge the court of appeals' decision to apply the 1982 version of the statute in *Eagleye I*. See Pet. 16.

the court of appeals' retroactivity ruling will have little continuing effect.

In any event, petitioner's claim in *Eagleye II* was not viable, regardless of which version of the False Claims Act is held applicable. As the courts below held, under the 1982 version of the Act, *Eagleye II* was properly dismissed upon the written consent of the government and the district court, pursuant to 31 U.S.C. 3730(b)(1) (1982); petitioner does not now dispute that conclusion. The same result, however, obtains if the amended version of the Act were to be applied. Under further amendments to the statute that were enacted in 1988, "[i]f the person bringing the action is convicted of criminal conduct arising from his or her role in the violation [of the False Claims Act], that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action." 31 U.S.C. 3730(d)(3). See Major Fraud Act of 1988, Pub. L. No. 100-700, § 9, 102 Stat. 4638. If the 1986 amendments had retroactive application, so presumably did the 1988 amendments. Petitioner was convicted of conspiring to defraud the United States arising from his role in the fraudulent practices at issue in this case. Accordingly, petitioner's claim in *Eagleye II* would have to be dismissed even if the 1986 amendments applied.

Moreover, on July 31, 1986, the parties to the *Eagleye I* litigation—including petitioner—entered into a stipulation that provided, *inter alia*, that "[t]he original complaint [in *Eagleye I*] shall not be the basis for any further proceedings by [petitioner] in this action or for any separate action brought or pursued by [petitioner]." Pet. App. 11a. That stipulation by its terms barred petitioner from filing the complaint in *Eagleye II*. That conclusion is further reinforced by two provisions of the amended False Claims Act that prohibit actions that are "based

upon allegations or transactions which are the subject of a civil suit * * * in which the Government is already a party," 31 U.S.C. 3730(e)(3),[6] and that provide that, once a *qui tam* action is brought, "no person other than the Government may * * * bring a related action based on the facts underlying the pending action," 31 U.S.C. 3730(b)(5).[7] The allegations in *Eagleye II* were either identical or substantially related to those made by petitioner and other relators in *Eagleye I*. Accordingly, petitioner's claim in *Eagleye II* was not viable, even if the amended False Claims Act were held applicable to this case.

b. Currently pending before this Court are two consolidated cases raising questions concerning the retroactivity of Sections 101 and 102 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. *Landgraf* v. *USI Film Products* and *Rivers* v. *Roadway Express*, Nos. 92-757 and 92-938 (argued Oct. 13, 1993). Section 101 amended 42 U.S.C. 1981 by providing that the phrase "make and enforce contracts" in that statute included "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 105 Stat. 1072. Section 102 amended Title VII of the Civil Rights Act of 1964 to allow victims of

[6] 31 U.S.C. 3730(e)(3) provides that:

> In no event may a person bring [a *qui tam* action] which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

[7] 31 U.S.C. 3730(b)(5) provides that:

> When a person brings [a *qui tam* action], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

discrimination to seek compensatory and punitive damages, in addition to backpay, and to permit either party to a Title VII case to seek a jury trial if such damages are sought. 105 Stat. 1072.

The decision in *Landgraf* is unlikely to have an impact on the outcome of this case. As we explain above, petitioner's claims in *Eagleye II*—the only claims to which petitioner now asserts the amended version of the Act should have been applied—were plainly barred for a variety of reasons under the 1982, 1986, and 1988 versions of the statute. Moreover, the provisions of the Civil Rights Act of 1991 at issue in *Landgraf* differ substantially from the provisions of the False Claims Act at issue here. We therefore believe that it would be appropriate simply to deny the petition for a writ of certiorari in this case. In the alternative, however, the Court may wish to hold this case pending its decision in *Landgraf*.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the Court may wish to hold this case pending its decision in *Landgraf* v. *USI Film Products* and *Rivers* v. *Roadway Express*, Nos. 92-757 and 92-938, and then to dispose of it accordingly.

Respectfully submitted.

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